TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 92

SERVICE STORAGE AND TRANSFER CO., INC., PETITIONER,

vs.

COMMONWEALTH OF VIRGINIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

PETITION FOR CERTIORARI FILED JUNE 9, 1958
CERTIORARI GRANTED OCTOBER 13, 1958

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA AT RICHMOND

Record No. 4748

SERVICE STORAGE AND TRANSFER CO., INC., Appellant,

against

COMMONWEALTH OF VIRGINIA, Appellee.

From the State Corporation Commission

ORDER AWARDING APPEAL AND SUPERSEDEAS—
May 14, 1957

Upon the petition of Service Storage and Transfer Company, Incorporated, an appeal of right and *supersedeas* is awarded it by one of the Justices of the Supreme Court of Appeals on May 14, 1957, from an order entered by the State Corporation Commission on the 26th day of February, 1957, in a certain proceeding then therein depending wherein the Commonwealth of Virginia, at the relation of the State Corporation Commission was plaintiff and the petitioner was defendant; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the said State Corporation Commission in the penalty of seventy-five hundred dollars, with condition as the law directs.

[fol. 2]

BEFORE THE STATE CORPORATION COMMISSION OF VIRGINIA

Case No. 13182

COMMONWEALTH OF VIRGINIA, at the relation of the STATE CORPORATION COMMISSION,

v.

SERVICE STORAGE & TRANSFER COMPANY, INCORPORATED.

ORDER AWARDING RULE TO SHOW CAUSE—
September 19, 1956

It appears to the Commission that Service Storage & Transfer Company, Incorporated, of Bluefield, West Virginia, was found to be hauling property in intrastate commerce without authority of the State Corporation Commission and in violation of Chapter 12, Title 56 of the Code of Virginia on the following occasions, to-wit:

August 21, 1956, U. S. Highway No. 460, one mile north of Pearisburg, Virginia, White tractor, Registration Card 18807, West Virginia license K-3345, shipment portable air compressor from Rish Equipment Company, Roanoke, Virginia, to Heron Todd Steel Construction Company, Incorporated, Glen Lyn, Virginia.

August 22, 1956, U. S. Highway No. 460, one mile north of Pearisburg, Virginia, no registration, no identification marker, International truck, West Virginia license K-3329, shipment cotton work clothing from Norfolk and Western Industries, Incorporated, Lynchburg, Virginia, to Sutphin & Jackson, Draper, Virginia.

September 6, 1956, U. S. Highway No. 460, one mile north of Pearisburg, Virginia, Registration Card 18798, White tractor, West Virginia license K-3337, shipment TV picture tubes, Leonard Electronics of Roanoke, Incorporated, Roanoke, Virginia, to Wytheville Vance Company, Wythe-

[fol. 3] ville, Virginia; kitchen cabinet sinks and parts, Roanoke Wholesalers, Incorporated, Roanoke, Virginia, to

Buchanan Furniture Company, Coeburn, Virginia; kitchen cabinet sink and parts, Roanoke Wholesalers, Incorporated, Roanoke, Virginia, to Clinchfield Coal Corporation, Coeburn, Virginia; kitchen cabinet and parts, Roanoke Wholesalers, Incorporated, Roanoke, Virginia, to Electric Appliance Company, Big Stone Gap, Virginia, and motor parts from Southwest Motor Parts Corporation, Roanoke, Virginia, to Oakwood Motor Company, Oakwood, Virginia.

September 11, 1956, U. S. Highway No. 58, near St. Paul, Virginia, Registration Card not shown, Assigned Number VCC-208, White tractor, West Virginia license 3341, shipment cotton goods from F. D. Lazenby & Company, Bluefield, Virginia, to Haysi Hardware & Furniture Company, Haysi, Virginia, and shipment steel plates, Bristol Steel & Iron Works, Incorporated, Bristol, Virginia, to Link Belt Company, Carbo, Virginia.

September 17, 1956, junction U. S. Highway 58 and 72 at Coeburn, Virginia, Exemption Card E-194, Classification Plate same number, Virginia license T-220-690, International truck, shipment medicine, Miles Laboratories, Incorporated, Roanoke, Virginia, to Kilgore Grocery Company, Coeburn, Virginia; shipment iron railway car wheels, Enterprise Wheel & Car Corporation, Bristol, Virginia; to Banner Fuel Corporation, Cranes Nest, Virginia; shipment steel beams, Bristol Steel & Iron Works, Incorporated, Bristol, Virginia, to Quesenberry Construction Company, Wise County Court House, Wise, Virginia, and shipment medicine from Miles Laboratories, Incorporated, Roanoke, Virginia, to Coeburn Grocery Company, Coeburn, Virginia.

September 18, 1956, U. S. Highway No. 58, five miles west of Gate City, Virginia, Assigned Number E-194, Virginia license T-220-699, International truck, two shipments automobile supplies, Southwest Motor Parts Corporation, Roanoke, Virginia, to Kelly Motor Company, Big Stone Gap, Virginia.

September 19, 1956, U. S. Highway No. 11, five miles west of Abingdon, Virginia, Assigned Number E-194, Virginia license T-220-690, International truck, shipment candy from Harris Woodson Company, Incorporated, Lynchburg, Virginia, to City Food Market, Coeburn, Virginia.

September 19, 1956, U. S. Highway No. 11, five miles west of Abingdon, Virginia, Assigned Number E-194, Virginia license T-220-697, International tractor, shipment TV set, Bluefield Hardware Company, Roanoke, Virginia, to Wise Hardware, Norton, Virginia.

[fol. 4] A rule is hereby awarded, returnable at the court room of the State Corporation Commission in the State Office Building in the City of Richmond at 10:00 o'clock, a. m., on October 30, 1956, requiring Service Storage & Transfer Company, Incorporated, to appear and show cause, if any can be shown, why it should not be fined or otherwise penalized and why any and all authority issued to the said corporation should not be suspended or canceled as provided in Section 56-304.12 of the Virginia Code.

A copy of this rule shall be served on the Secretary of the Commonwealth and a copy shall be served on the agent of Service Storage & Transfer Company, Incorporated, at Roanoke, Virginia, and a copy sent by first class United States Mail to Service Storage & Transfer Company, Incorporated, Drawer 310, Bluefield, West Virginia.

A True copy.

Teste:

N. W. Atkinson, Clerk of the State Corporation Commission.

BEFORE THE STATE CORPORATION COMMISSION

[Title omitted]

Transcript of Hearing of November 29, 1956

Present: Commissioners W. Marshall King (Chairman), H. Lester Hooker, Ralph T. Catterall.

(Commissioner Hooker presiding.)

[fol. 5] APPEARANCES:

Francis W. McInerny and O. L. Shewmake, Counsel for Service Storage & Transfer Company.

W. C. Seibert, Commerce Counsel, State Corporation Commission.

Commissioner Hooker: You may proceed, Mr. Seibert.

Mr. Seibert: May it please the Commission, this case, No. 13182, is another case against Service Storage & Transfer Company, Inc. alleging the operation of motor vehicles in Virginia without authority of the State Corporation Commission and transporting of property as a common carrier in violation of Chapter 12, Title 56 of the Code of Virginia. The particular offenses alleged are set out in the rule and will be shown by the proper witnesses.

As the Commission will recall, this is the second rule of a similar kind against this company.

Commissioner Hooker: Against the same carrier?

Mr. Seibert: Yes, in Case 1374, the Service Storage and Transfer Company was fined twenty-five dollars and costs. Following that case Mr. Randolph Harrison came to see me.

Commissioner Hooker: In that former case the Commission decided it, and a formal opinion was written?

Mr. Seibert: I don't think the opinion was written.

Mr. McInerny: There was a memorandum accompanying it and some altercation or discussion of it.

Commissioner Hooker: And this rule is for violating the memorandum the Commission issued in the former case.

Mr. Seibert: I think it has been, but I want to explain further, and Judge Shewmake can say I am wrong if I am.

As the Commission well knows and the map will indicate, as you go from Roanoke to Bluefield the normal operation between Roanoke and Bluefield is through the State of West Virginia. The defendant operates to Bluefield and uses Bluefield as a center and fans out in his operation from his Bluefield, West Virginia terminal. Following the Commission's decision in the previous case, Mr. Randolph Harrison came to Richmond and discussed the determination of the territory, which could be considered largely interstate because of the situation there in the difference of state between Virginia and West Virginia and what would be the normal movement of traffic, [fol. 6] through Bluefield. I told Mr. Harrison that we would present to the Commission what we considered as territory which would be interstate and in which our in-

spectors would not stop an operator. Mr. Harrison told me that he could not agree to anything, and I said, of course, I could not agree to anything, that it would have to go to the Commission. He was to take back to his people the suggestion we agreed upon, and upon receipt of advice from him I was to take it up with the Commission. I received no advice, and the matter now comes on for hearing.

The operation of motor vehicles interstate in Virginia has continued and continues, so far as I know, up to today and is what we would call a continuous operation by the men in the territory. The rule does not only cover alleged movements in the territory, but other violations, and since the issuance of the first rule by the Commission those shipments in the first case on which they were fined have continued, even in the face of that rule, the shipments from Roanoke to Covington, which could not by any chance be considered interstate.

Mr. McInerny: I would like to supplement what Mr. Seibert has stated. The facts stated by Mr. Seibert are substantially correct. He does state accurately that we did come here with the suggestion, without the full letter of the law in the matter, that there might be a practical way to dispose of the issues involved; and, as he suggested to the Commission, some of the traffic originating at one Virginia point and destined to another Virginia point is genuinely interstate, without any possibility of any invalidity. Such a place as that is from Roanoke to the northern section of the State. If you have a map, I could give an example, say, of Roanoke to Grundy, the logical or normal movement would be through Bluefield, West Virginia, rather than wholly Virginia highways or highways wholly situated in Virginia.

We also advised Mr. Seibert at the time we discussed the practical disposition of the controversy that because the carrier does hold an interstate certificate, it felt obligated to consult with the Interstate Commerce Commission concerning their view in the matter. At first the letter was addressed to the District Supervisor located in Roanoke. That was done in August. The District Supervisor's absence from his office on vacation and other

matters delayed his response, and when I received that I advised Mr. Seibert of the effect of it, and, to make his conclusions known officially, I consulted the Director of the [fol. 7] Bureau of Motor Carriers in Washington. The advice we have from both of those offices in Washington is that the respondent carrier does have sufficient interstate operating authority to conduct the operation it has been conducting and against which rules have been issued against them.

I want to diverse on one point, and that is the most recent rule, the one today, a total of nineteen violations are alleged. Of the nineteen, I believe that a total of six are really in controversy, and the other movements are those that would be in the twilight zone, where it could be considered interstate commerce or intrastate commerce, depending on the particular movement.

I think when we appeared here before we tried to demonstrate the carrier's good faith, and I do have some evidence that I will put on by a competent and qualified witness to show the exact pattern of its shipments that move from points in Virginia under the normal operation.

I don't know whether Mr. Seibert has been advised of this or not, that since the issuance of the last rule, many questionable operations were terminated, and, by reason of the delay involved to some of the shippers and consignees, we had to make adjustments, and some have not been able to make adjustments, to replace the carrier service afforded by respondent, and they have submitted charges to Mr. Seibert that there is nothing available for them to do and that they know there is interstate commerce through Bluefield and through Bluefield, West Virginia, and the billings are on interstate commerce billings, governed by interstate tariffs, and I feel confident everything I have said is factually accurate.

Mr. Seibert: It may be factually accurate, but we don't agree that it is correct. The fact that they go to Bluefield, West Virginia for their own convenience does not validate the operation. We say it is not the normal, logical movement.

Mr. McInerny: May I say something in regard to the carrier's own convenience, that from the traffic, under the

interpretation of the Interstate Commerce Commission, the movement of all traffic from West Virginia to Virginia points, they must observe Bluefield, West Virginia as the gateway point, because that is the point designated by the Interstate Commerce Commission.

Commissioner Catterall: They would not force you to take a parcel from Bluefield to Roanoke and back to Salem, would they?

Mr. McInerny: The situation on that is, as a practical [fol. 8] matter, I don't think the traffic would be offered to the carrier, but as a matter of law, I don't think an extreme situation of that type has ever been tested, and, theoretically, under the adjudication by the two authorities there, because the tariffs are in existence, and they are holding out under the tariff theoretically a shipment as an interstate shipment, they could complain to the Interstate Commerce Commission and ask the Commission to require the carrier to perform that service; and if it was performed, the only legal way it could be performed under the Interstate Commerce Commission would be through Bluefield, West Virginia.

Commissioner Hooker: I have a letter here from Mr. Blanning, Director of the Interstate Commerce Commission Bureau of Motor Carriers, which seems to be inconsistent with your statement and which reads as follows:

"Whether such manner of operation constitutes a *bona fide* interstate operation or an attempt to evade the jurisdiction of the Virginia authorities would seem to depend upon all the facts, and I express no opinion in that regard."

Mr. McInerny: I believe I was the one that sent that to the Commission.

Commissioner Hooker: You may have, but your statement does not state the facts.

Mr. McInerny: It does, Your Honor, and there was a Maryland operator, a carrier having authority from Baltimore to Washington, and also a second link of authority between Washington and Annapolis. He was conducting operations from Baltimore to Annapolis, and the Maryland authorities brought a proceeding against him to cause him to cease and desist; and he resisted the proceeding, and the Maryland Court of Appeals upheld the decision

that that operator was operating wholly intrastate in Maryland; in other words, the carrier was short-circuiting by coming through directly to Annapolis and not going to Washington and coming back, and they made him desist, but any shipments from Washington, D. C. they held were interstate shipments.

Commissioner Hooker: But that was an interstate operation.

Mr. McInerny: The situation is wholly analogous.

[fol. 9] Commissioner Hooker: If he picks up and delivers in Virginia, it is wholly intrastate business.

Commissioner Catterall: He was going straight down No. 2.

Commissioner Hooker: In going to Washington.

Mr. McInerny: It was from Baltimore directly to Annapolis.

Commissioner Hooker: But that was intrastate.

Mr. McInerny: When he did it solely on the intrastate highway, the Maryland Court held it had to take it through Washington, D. C., and when he did take it to Washington, it was *bona fide* interstate.

Commissioner Catterall: That would not be *bona fide*, because he showed the direct way was down Route 2.

Mr. McInerny: I have already made it clear——

Commissioner Hooker: I think we had better hear the facts. We can't decide it on argument without hearing the facts.

Proceed with your evidence, Mr. Seibert.

Mr. Seibert: The evidence before the Commission will be presented by two different inspectors. Mr. Jones has made part of it, and Mr. Kinzer the other part.

E. O. Jones, Jr., a witness introduced on behalf of the Commonwealth, being first duly sworn, testified as follows:

Direct examination.

By Mr. Seibert:

Q. Give your name.

A. E. O. Jones, Jr.

Q. What is your business?

A. I am Investigator, Motor Transportation Department.

Q. Where are your headquarters?

A. Roanoke, Virginia.

Q. In the course of your duties, did you on August 21, 1956 check a motor vehicle on U. S. Highway No. 460, one mile north of Pearisburg, Virginia, and, if so, explain the license number and what you found on that vehicle.

A. I checked a White tractor, on August 21, 1956 at 2:45 P. M., owned by Service Storage & Transfer Company, Inc., Bluefield, West Virginia. The White tractor [fol. 10] was bearing West Virginia license K-3345 and bearing Virginia identification card and marker 18807, which was issued under their assigned number. He was hauling miscellaneous freight from Roanoke, Virginia to Bluefield, West Virginia by way of Glen Lyn, Virginia.

Q. Did he have any intrastate shipments on that vehicle?

A. He did.

Q. Which shipments did he have?

A. He had a shipment listed on Service Storage & Transfer Bill No. 32534, dated August 20, 1956, from the Rish Equipment Company in Roanoke, Virginia to the Heron Todd Steel Construction Company Inc., c/o Appalcachian (sic) Electric & Power Company, one steel air compressor.

Q. State on the map where Glen Lyn is.

Commissioner Hooker: Glen Lyn is wholly within the State of Virginia?

A. Yes, wholly within the State of Virginia, and the corporate limits are just before you cross the Virginia-West Virginia line.

By Mr. Seibert:

Q. And a shipment from Roanoke to Bluefield would not move through Glen Lyn?

A. No.

Commissioner Catterall: Which way was this truck headed?

A. Toward Bluefield.

Q. Going west?

A. Yes, sir, west on 460.

By Mr. Seibert:

Q. Now, on August twenty-second did you make another inspection of another vehicle?

A. I did make a similar inspection of another vehicle. This vehicle on the twenty-second of August was checked at 9:30 A. M.

Q. Where was that check made?

A. On Route 460 in Giles County, one mile north of Pearisburg. The tractor was owned by Service Storage & Transfer Company, Inc. and was an International two-axle truck, bearing West Virginia license K-3329.

[fol. 11] Q. It had no identification marks?

A. No, sir.

Q. Did you check an intrastate shipment on that vehicle?

A. Yes, there was a shipment under Service Storage & Transfer Company Bill No. 31389, dated August 16, 1956 from Norfolk & Western Industries, Inc. in Lynchburg, Virginia to Sutphin & Jackson, Draper, Virginia.

Q. Where is Draper located?

A. Two miles north of Pulaski, Virginia, on State Route 100.

Q. In what county?

A. Pulaski.

Q. How was that vehicle headed, on 460?

A. Yes, the vehicle, as well as I recall, was headed toward Pulaski from Bluefield; in other words, traveling south on U. S. 460.

Q. Now, I think the next date is September the sixth at the same place you made the previous check. That is about 30 or 40 miles from Roaonke? (sic)

A. It is between 50 and 55 miles from Roanoke.

Commissioner Hooker: How far is it from Draper to Bluefield, West Virginia and from Lynchburg to Draper?

A. In excess of 50 miles, not over 60 miles.

Q. It is as far from Bluefield to Draper as from Roanoke to Draper?

A. Yes, sir.

Q. The most direct route to serve Draper would be Roanoke to Bristol?

A. Actually, the most direct route would be Roanoke to Draper direct.

Q. And more direct than the Route 11?

A. The direct route goes through Draper.

Chairman King: What is the state number of that route?

A. State Route 100.

By Mr. Seibert:

Q. It leads off from Dublin?

A. Yes, from Dublin you go out Route 11 and go around [fol. 12] the route and then go around to Draper and to Route 11 again.

Commissioner Catterall: Did you ask the driver if he transported this property to Bluefield and back again?

A. The driver stated that the truck was loaded the night before in Bluefield, West Virginia. I assumed that the shipment was a part of a whole shipment originating in Roanoke and delivered to Bluefield and reallocated to the other vehicle. This was a pick-up and delivery truck, whereas the original shipment was probably a part of the tractor and trailer unit which originated at Roanoke.

Q. You were not able to ascertain whether it was dropped off at Glen Lyn or on the way to Bluefield?

A. He was going toward Bluefield.

Q. But he had not reached Glen Lyn?

A. No, we were ten miles from Glen Lyn.

Q. And you did not follow him?

A. No.

Commissioner Hooker: And the shipment from Roanoke to Draper went to Bluefield first?

A. Yes.

Chairman King: What was the date there, August twenty-second?

A. August twenty-second.

Q. And the other one was what date?
A. August twenty-first.

Mr. McInerny: Mr. Seibert, is it your idea to have them present it in the order they are in the Rule?
Mr. Seibert: Yes, as they are in the Rule.

By Mr. Seibert:

Q. September the sixth you made another check on Route 460 in Giles County, one mile north of Pearisburg at 7:10 A. M. Will you tell us about that?
A. I checked a White tractor bearing West Virginia [fol. 13] License 3337, bearing registration card No. 18798, issued to Service Storage & Transfer Company, Inc. and assigned No. 208 from the Commission.
Q. And that check was made near Pearisburg?
A. Yes.
Q. Did you find any intrastate shipments on that vehicle?
A. I did.
Q. Explain what they were.
A. He had a shipment to Service Storage. I assume he had a straight bill of lading. He had no number attached to the bill from Leonard Electronics of Roanoke, Virginia going to Wytheville Vance Company, Wytheville, Virginia.
Q. Where is Wytheville?
A. On Route 11, just south of Pulaski, about twenty miles.
Q. Anything else on that vehicle?
A. Yes, he had a shipment from Roanoke Wholesalers, Inc., Roanoke, Virginia to Buchanan Furniture Company at Coeburn, Virginia.
Q. Do you know where Coeburn is?
A. Yes, it is located in Wise County, just east of Wise, some ten miles east of Norton.
Q. Were there any other shipments on this vehicle?
A. He had a similar shipment from Roanoke Wholesalers, Inc. to the Clinchfield Coal Corporation of Coeburn, Virginia; and also a shipment from Roanoke Wholesalers, Inc. to the Electric Appliance Company of Big Stone Gap.
Q. Big Stone Gap is just west of Highway 23?
A. Just west of Norton.
Q. And was there another shipment on there?

A. There was another shipment from Roanoke, from the Southwest Motor Parts Corporation at Roanoke, Virginia to the Oakwood Motor Company in Oakwood, Virginia.

Q. Where is Oakwood?

A. I believe that is in Buchanan County, just south of Grundy. I don't believe it is shown on this map, but it is between Richlands and Grundy.

Commissioner Hooker: All of these shipments were on the same truck on September the sixth?

A. Yes, sir, all on the same truck, all part of the same lading.

[fol. 14] Q. Are you familiar with the highway between Coeburn and Grundy?

A. Yes, sir, I am.

Q. You don't have to go into West Virginia to go to those points?

A. Between Coeburn and Grundy?

Q. Yes.

A. From Roanoke?

Q. To go from Roanoke to Wytheville, do you go to Coeburn first, or do you have to go to West Virginia at all?

A. It is not necessary. If you go from Roanoke to Coeburn direct, you mean?

Q. Yes.

A. The most direct route from Roanoke to Coeburn is via Abingdon by Route 11 for 178 miles from Roanoke to Coeburn; via Bluefield, West Virginia, it is 201 miles via Lebanon.

By Mr. Seibert:

Q. Now, Mr. Jones, you were aware of this Rule of September nineteenth, were you not?

A. Yes.

Q. And also aware of the Commission's order in the previous case, Case No. 13074?

A. Yes.

Q. And I believe the decision in that case was made on July 9, 1956?

A. That is correct.

Q. Now, in addition to the shipments referred to in the

Rule of the Commission of September 19, 1956, have you continued to check on the highways and found other vehicles operated by the Service Storage & Transfer Company hauling intrastate shipments?

A. I have.

Q. Can you give the Commission those shipments?

A. On October eighteenth at 5:30 P. M. on Route 460 in Montgomery County, about four miles east of Blacksburg, I checked a two-axle van, International, owned by Service Storage & Transfer Company, Bluefield, West Virginia, license No. K-3319. He was operating and hauling miscellaneous freight from Roanoke, Virginia to Kimballton, Virginia.

Q. Where is Kimballton?

[fol. 15] A. In Giles County, between Pembroke and Pearisburg.

Q. That is how far from Roanoke?

A. From Roanoke to Kimballton is 66 miles.

Q. How far is that east of Bluefield?

A. I can tell you how far it would be from Roanoke to Bluefield and coming back to Kimballton.

Q. How far from Roanoke to Bluefield?

A. It is 111 miles.

Q. And did you not say it is 66 miles from Roanoke to Kimballton?

A. Yes, sir. 66 miles.

Q. That would make it 45 miles from Bluefield east to Kimballton?

A. Approximately, yes, sir.

Mr. Seibert: I would like to call to the Commission's attention that in this particular case it was a similar shipment to that referred to in the Commission's order previously.

Commissioner Hooker: In other words, this is a violation of the finding in the former case?

By Mr. Seibert:

Mr. Seibert: Yes, that is another example of the violation of the Commissioner's order.

Q. Have you any other shipments?

A. Yes, on October 25, 1956 at 2:15 P. M. in Bland County at the intersection of U. S. 52-21 and State Route 61 I checked an International tractor owned by Service Storage & Transfer Company, Inc. bearing West Virginia License No. K-6398, operating under Card 21433 under the State Corporation Commission. There was no assigned number painted on the vehicle. This truck had a shipment under Service Storage & Transfer Company Shipping order dated October 23, 1956 coming from Reevers, Inc., Chilhowie, Virginia.

Q. That is on No. 11?

A. Yes, just south of Narrows.

Q. Where was that going?

A. Going to the Davis Feed and Seed Store at Martinsville, Virginia.

Commissioner Hooker: Where?

[fol. 16] A. Going to Davis Feed and Seed Store, Martinsville, Virginia.

Q. It could not possibly go through any other states going between those points?

A. It could go to North Carolina. It could go through Mount Airy, North Carolina.

Q. Mount Airy, North Carolina?

A. Yes.

Q. How much out of the way would that be?

A. From Chilhowie to Martinsville direct is 132 miles.

Q. That is through Roanoke?

A. No, through Wytheville.

Q. And down through Patrick over Route 58?

A. Yes.

By Mr. Seibert:

Q. That is the direct route?

A. Yes, that is the direct route, but it could go through Roanoke and direct to Martinsville.

Mr. Seibert: If I recall correctly, I found the Interstate Commerce Commission's certificate, but I don't believe the Service Storage & Transfer Company has any rights in North Carolina.

Mr. McInerny: I will stipulate that.

Commissioner Catterall: If you went from Chilhowie to Bluefield to Martinsville, how far would that be?

A. 245 miles. That, of course, is going through Bluefield and coming back through Pearisburg and Roanoke.

Q. Did you ask that driver if he had been to Bluefield?

A. He was on the road four or five miles from the State line, going to Bluefield. He was bringing it from Chilhowie through Bluefield, West Virginia, coming back to Chilhowie.

Mr. McInerny: If I understand Counsel for the Commission correctly, he is not alleging that any of these movements failed to move through the terminal at Bluefield, West Virginia.

Mr. Seibert: I don't know how they moved. This is what we found. I cannot say that they do or do not. In some of these cases, I don't think the fact that he goes to Bluefield and in and out makes any difference, but the allegation [fol. 17] is that they all go to Bluefield and back.

Commissioner Catterall: We have not yet found a witness that stated that they did not go through Bluefield?

Mr. Seibert: No.

Mr. McInerny: On these shipments, on cross examination, I assume that Counsel for the Commission will agree that there is no evidence produced by the State that any of these vehicles in routing the shipments from one point to another point in Virginia failed to move through Bluefield, West Virginia.

Mr. Seibert: Up to this point there has not been. I don't know what is coming.

Witness: In addition to the shipment just mentioned, there was a shipment on Service Storage & Transfer Company Bill No. 65666, dated October 23, 1956, from Heekin, Inc., c/o Flat Top Warehouse Company, Bluefield, West Virginia, going to the Mathieson General Stores of Saltville, Virginia. I might add that the driver stated this shipment was being returned to the shipper.

Commissioner Hooker: What was that?

A. The driver stated that that was being returned to the shipper.

Commissioner Catterall: He did not claim that he was going to take that to Bluefield?

A. If I might explain, during the course of my investigation I determined that the driver had originated that morning with his load and had made surrounding deliveries of merchandise he had on his trailer, and I assume that for some reason the Mathieson General Store refused this shipment, as well as the next shipment the consignee refused, and it was being returned either to the Service Storage & Transfer Company or to the shipper.

Commissioner Catterall: He had crossed over from Bluefield, West Virginia when you found him?

A. Yes, he had that morning already been in Virginia from Bluefield.

Q. Then he picked up the parcel in Bluefield, Virginia. I [fol. 18] don't suppose you asked him if he had been to Bluefield, West Virginia?

A. He said this was being returned to the shipper because it was refused by the receiver. I don't know whether he picked it up en route from Saltville to Bluefield or whether it ran through Bluefield, West Virginia.

Q. Do you have the name of that particular driver?

A. His name was David Leon Williamson of Marmet, West Virginia. The other shipment which was on the trailer, which is similar in nature to the one I just referred to, was from the Sealy Mattress Company at Bluefield, Virginia, consigned to the Center Furniture Company at Marion, Virginia on Service Storage & Transfer Bill No. 65681, dated October 23, 1956.

Commissioner Hooker: Coming out of Bluefield, West Virginia, would you come through Bluefield, Virginia; is that the direct route?

A. Depending on which direction you are going.

Q. To Marion?

A. I would think that it would be, with a tractor-trailer. There are only two ways through Bland County.

Q. Picking it up in Bluefield and going to Saltville, would

it be feasible to turn around and go through West Virginia and come back on the same road?

A. No, sir.

By Mr. Seibert:

Q. In other words, a shipment from Bluefield, Virginia to Marion would come down 460 to Tazewell and down 16 to to (sic) Marion, and, likewise, would come down 16 and 42 to Saltville?

A. Yes, sir.

Commissioner Catterall: Now, when you stopped that vehicle, was it going to or away from Bluefield?

A. It was going toward Bluefield, West Virginia, on Route 52, and Route 52 comes into Bluefield, West Virginia.

By Mr. Seibert:

Q. That particular shipment, according to the statement of the driver, did not go into West Virginia first?

[fol. 19] A. I have no way of knowing, on these particular shipments, whether he picks them up en route to Marion or whether they are part of the shipments which have been picked up formerly in Bluefield and rerouted on his trailer to Bluefield.

Q. Did you not say the shipment from Mathieson was a returned shipment?

A. It was being returned to Bluefield.

Commissioner Hooker: That was the point I was making, that you have to go through Bluefield, Virginia to go to Bluefield, West Virginia.

A. Not if you go over 52.

Q. How would you go to Princeton?

A. Route 52 enters into Bluefield, West Virginia at the southern city limits.

Mr. McInerny: May I make inquiry of the Counsel and the Commission that all of this in no way relates to the account set forth in the Rule.

Mr. Seibert: No, as I stated to the Commission, the first three cases were set out in the Rule, but since the issuance of

this Rule and the decision by the Commission, the operations have continued as we have outlined here.

Cross examination.

By Mr. McInerny:

Q. Mr. Jones, when you made your investigation and apprehended these drivers, did you flag them down, or do you meet them at some terminal point?

A. I might interrupt you to say that the drivers were not apprehended.

Q. When you had your conference with the drivers, what method did you proceed under?

A. In all the instances mentioned in my testimony, with the exception of the truck which was stopped in Montgomery County, they were all checked at a road block, during which we were checking all truck traffic.

Q. And when you informed the driver you had a legitimate purpose for investigating the lading on the vehicle, did you ask for the shipping documents accompanying the truck?

A. I did.

[fol. 20] Q. Did you receive them in each case from the driver?

A. I did.

Q. Is this one of the shipments which you have knowledge of, sir?

A. Yes.

Q. Is that a duplicate copy of the manifest or instruments shown you by the driver?

A. The pro is.

Q. Did he also show you the other instruments that accompanied the vehicle at that time?

A. I don't recall seeing them.

Q. Did you ask for them?

A. I might clear up something before we go into this further, Mr. McInerny. At the time when I checked the vehicle, I asked the driver for his bill. Some drivers do not desire or are under instructions from the company not to let go of the manifest for the trucks they have, and I have run

into cases where the driver was even reluctant to produce the manifest; however, the drivers all produce the lading. That is why I am unsure of whether that was produced or not.

Q. With respect to the drivers from Service Storage & Transfer Company, were they willing to produce anything they were asked for? Were they cooperative?

A. Oh, yes.

Q. Let's take a specific shipment you checked, the one from the N & W Industries from Lynchburg to Draper, Virginia, on Service Storage & Transfer Bill 31389, I believe, and I have a copy of that, a photostat copy, and it is what we term a "manifest," and what does the manifest indicate to you, sir? Is that shipment listed on the manifest?

A. It does not give the same pro number. It shows on the manifest the pro number as 13154, and the actual pro number of the bill was 31389.

Q. But the shipment is a one-piece shipment weighing 101 pounds moving to Draper?

A. That is correct.

Q. Moving on August 16, 1956?

A. That is correct.

Q. And the manifest shows it was delivered to Service Storage & Transfer Company at Bluefield, West Virginia, does it not?

A. Yes, sir, it does.

[fol. 21] Q. Now, a second instrument, entitled "Service Storage & Transfer," shows that the shipment moved out of Bluefield, West Virginia to the ultimate destination, does it not?

A. It does.

Q. So would you not conclude from those three instruments, the freight bill and the two manifests, that, at least with respect to this particular shipment, it was picked up at Lynchburg and brought into Bluefield, West Virginia, and then assigned on a small truck, the pick-up and delivery truck you described, to the ultimate destination of Draper?

A. Yes, sir.

Q. You indicated, with respect to the shipment from Roanoke to Glen Lyn, the first one indicated on the Rule, that it moved from Roanoke to Bluefield via Glen Lyn. Did you intend to convey in that statement that the shipment moved

from the point of origin to the point of destination without being terminated in Bluefield, West Virginia?

A. No, sir. I have no way of knowing whether he delivered the load before he got to Bluefield, West Virginia, or not. I was merely trying to clarify to the Commission the route he took.

Q. With respect to any of the shipments you referred to or investigated, you could not say nor have you any evidence to support, any allegation to the effect that any of the shipments failed to go through Bluefield, West Virginia?

A. No, sir, I don't.

Q. And the evidence you do have, to the extent you have investigated it, does not all your investigation indicate that the traffic did, in fact, move through Bluefield, West Virginia?

A. Yes, sir.

Q. Every shipment?

A. I cannot be sure whether they did or not, but I would assume from the documents you have put before me, I would assume they do.

Q. And, having a knowledge of the operations in that area of the State, don't you, as a matter of fact, believe this traffic moved from Roanoke down through Southwest Virginia actually does move through our Bluefield, West Virginia terminal?

A. I would not have any way of knowing whether the nor-
[fol. 22] mal flow of traffic would be through Bluefield, West Virginia.

Commissioner Hooker: There is no use to question him on that, because the Commission would prefer that the record show, and not get the record confused about one shipment going in and out, but stipulate that all movements did go outside of the State of Virginia.

Mr. Seibert: I would be willing to stipulate that except as to the shipment to Martinsville. All of this evidence indicates that all of these shipments went to Bluefield, West Virginia.

Witness stood aside.

11:25 A. M. Commissioner Hooker: The Commission will recess for ten minutes.

11:40 A. M. The Commission resumes its session.

L. A. KINZER, a witness introduced on behalf of the Commonwealth, being first duly sworn, testified as follows:

Direct examination.

By Mr. Seibert:

Q. Please state your name and position.

A. I am Investigator L. A. Kinzer, State Corporation Commission, Division of Motor Transportation. I am stationed in Southwest Virginia at Glade Springs, Virginia.

Q. I believe you made a check of a number of vehicles of the Service Storage & Transfer Company, did you not?

A. Yes, sir.

Q. And you are aware of the ones referred to by the Commission's Rule?

A. Yes.

Q. As quickly as possible, and don't go into too much detail in setting out the cases, will you proceed to state to the Commission what your investigation revealed.

Mr. McInerny: Can't we stipulate as to that?

Mr. Seibert: I think we had better proceed.

[fol. 23] Q. On September eleventh did you check a motor vehicle on Highway 58 near St. Paul, Virginia.

A. Yes, sir, I did.

Q. And that shipment was carried on a White tractor with West Virginia License No. 3341; is that correct?

A. Yes.

Q. Owned by Service Storage & Transfer Company, Inc.?

A. Yes.

Q. Was there a shipment of cotton goods from F. D. Lazenby & Co., Bluefield, Virginia to Haysi Hardward (sic) Company, Haysi, Virginia?

A. Yes, sir.

Commissioner Hooker: On that shipment from Bluefield to Haysi, what route is that?

A. I checked him at St. Paul on Route 58.

Q. You stopped the truck at what point?

A. At St. Paul, going to Haysi.

Q. From Bluefield through to Haysi is in what county?

A. Haysi is in Dickinson County, almost at the line of Buchanan.

Q. Was he coming from Bluefield?

A. He was going toward Haysi from Bluefield, West Virginia. This was picked up at the terminal in Bluefield, West Virginia.

By Mr. Seibert:

Q. He had a shipment of steel plates from the Bristol Steel & Iron Works to Link Belt Company at Carbo, Virginia, did he not?

A. Yes.

Q. And that is in Russell County?

A. Yes.

Commissioner Hooker: Was that going to Appalachia?

A. No, to the Link Belt Company, Line No. 2.

By Mr. Seibert:

Q. What is the distance from Bristol to Carbo?

A. Forty-eight miles.

[fol. 24] Q. Do you know whether that shipment went through West Virginia?

A. Yes, sir, the boy told me he was coming down from Bluefield.

Q. Do you mean to say that the shipment moved from Bristol to Bluefield and back to Carbo?

A. Yes, sir, that is what the boy told me.

Q. And when you picked him up, he was on Route 58 near St. Paul?

A. Yes.

Commissioner Hooker: What is the distance from Bristol, Virginia to Bluefield, West Virginia?

A. Ninety-five miles.

Q. And from Bluefield, West Virginia, how far is it to Carbo, what is that distance?

A. I don't know the exact distance.

Colloquy Between Commission and Counsel

Commissioner Hooker: It might save some time, if it would be agreeable to all parties, if we checked the distances

from the highway map and put them in the record, rather than have them put in in this way.

OFFER IN EVIDENCE

Mr. Seibert: We will file one of the State Highway maps and show evidence of the routes in contrast, and we will file that as the next exhibit.

Commissioner Hooker: That will be Exhibit 1.

Mr. McInerny: I have had one of my witnesses work up some typical illustrations giving the direct mileage and comparing the route as observed by the carrier, but I don't think it encompasses all of them—they are just examples.

Mr. Seibert: I believe it has been stipulated that there have been the movements as shown in the Rule, that these shipments actually moved?

Mr. McInerny: Yes.

Mr. Seibert: And that direct mileage can be determined by Exhibit 1?

Mr. McInerny: Yes.

Mr. Seibert: Since the Rule was issued, there have been some additional shipments that are not in answer to the Rule.

Commissioner Hooker: Is there any question about what Mr. Seibert has stated, that they have gone on and disregarded the formal proceeding of the Commission?

[fol. 25] Mr. McInerny: I think it is a little unfair to say that we have not been placed on notice of those movements.

Commissioner Hooker: Just for the record, to show that that has occurred.

Mr. McInerny: Suppose we make the confession this way, that up to November first of this year, when we were advised by the Interstate Commerce Commission, we continued the traffic, and since November first all shippers have been advised that there is a controversy before this Commission and until that is settled no traffic is being handled in the controversial area. We have a tacit understanding, not binding on either Mr. Seibert or myself, at least with respect to some Virginia traffic moving from one point in Virginia to another point in Virginia, it is

interstate commerce, and that traffic is still being handled by the carrier; but the other, more controversial ones, we have issued instructions to the shippers that that is not going to be handled, and I think it might be desirable for us to get informal advice as to what way to proceed on that during the pendency of the proceeding, so there will be an understanding, both on the Commission's side and on the shipper's.

Mr. Seibert: We have received two letters, one from the Sealy Mattress Company and one from Erwin Supply and Hardware Company, asking that they be allowed to continue shipping by this carrier.

Commissioner Hooker: Have any of these points in controversy been served since November first?

Mr. McInerny: Yes, sir.

Commissioner Hooker: So they have not followed our instructions?

Mr. McInerny: The order went out November the first.

By Mr. Seibert:

Q. Have you had any since November first, Mr. Kinzer?

A. Yes, November sixteenth on Highway 58 in Wise County between St. Paul and Coeburn, Virginia, I stopped an International truck belonging to the Service Storage & Transfer Company, Bluefield, West Virginia, with card marked assigned E-1914, bearing Virginia license T-220690 from Bristol, Virginia. Driver stated that this freight was picked up at the terminal in Bristol, and it had one intrastate shipment.

[fol. 26] Commissioner Hooker: What was the date?

A. November sixteenth.

Q. Quite some time after November first?

A. Yes.

By Mr. Seibert:

Q. Where was he going?

A. To Norton, Virginia.

Q. From Bristol to Norton?

A. No, from Roanoke to Norton.

Q. Is that the only one you have since November first?
A. Yes, sir.

Cross examination.

By Mr. McInerny:

Q. On your report of investigation, which you apparently made at the time, it indicates that there was one intrastate shipment moving from Bristol to Norton, Virginia via Bluefield, West Virginia, and it had a weight of 112 pounds, and it was accompanied in the same vehicle with seventeen other shipments, all of which were interstate?
A. Yes.
Q. Do I understand that since November first that is the only shipment you have found that would be in the controversial area?
A. Since November first.
Q. Do you know who the shipper was on that shipment?
A. It is on that bill.
Q. Double Envelope Corporation at Roanoke to Norton, Virginia. I am a little confused with respect to the shipment you mentioned. Does it not indicate that the origin point was Roanoke, Virginia rather than Bristol?
A. It was from Roanoke and picked up at the terminal in Bristol.

Commissioner Hooker: Brought to Bristol by Rutherford?

A. No.
Q. How did it get to Bristol?
A. Probably by Service Storage & Transfer Company from Roanoke to Bluefield, and from Bluefield, West Virginia to Bristol, and then it was put on this truck to service it.

[fol. 27] By Mr. Seibert:

Q. That is an assumption on your part, but, so far as you know, it left Bristol terminal of the defendant on the truck which picked up the shipment in Bristol?
A. Yes.

By Mr. McInerny:

Q. At any rate, this traffic originated at Roanoke and was consigned to a consignee at Norton, and whatever terminal handled it, you don't know or cannot say, because you don't know whether it was routed to the Bluefield terminal and then to Bristol?

A. No, I cannot say. The only thing the driver stated was that it was picked up at the Bristol terminal.

Mr. McInerny: Since no definite information can be shown with respect to the actual routing of these shipments, I assume counsel will agree that at least the point in here is among the points we had considered in the past not too controversial.

Mr. Seibert: I will state to the Commission what is involved in it later, but, according to this witness, this shipment went to a terminal in Bristol and was handled at the Bristol terminal and the shipment was made from the Bristol terminal; whether it went to Bluefield, West Virginia prior to the time it was handled at the Bristol terminal, I do not know.

By Mr. McInerny:

Q. On all the trucks you inspected, did you find that, in the main, the freight consisted of what is known as "L.T.L. freight shipments," small shipments, sir?

A. Yes.

Q. Ranging in weight, possibly, from as little as thirty-five pounds to as much as five thousand pounds in some cases?

A. Yes, sir.

Q. Did you ever encounter a vehicle of the Service Storage & Transfer Company from one Virginia point to another Virginia point laden with a single-volume shipment in excess of fifteen hundred or two thousand pounds?

A. No, sir.

Q. And when you did stop these vehicles and investigate them, you found that the vast majority of the freight on the [fol. 28] various vehicles consisted of movements from one state to another state, and only a few small number consisted of movements from one point in Virginia to another point in Virginia?

A. I have checked some that had four Virginia movements.

Q. Out of a total of how many?

A. Of twenty-five interstate shipments and four intrastate shipments.

Q. Would that be about the maximum that you would encounter on a single vehicle?

A. It would run three or four, or thereabouts.

Q. And the remaining twenty-five would all be interstate movements?

A. Yes.

Redirect examination.

By Mr. Seibert:

Q. Your operations in checking these vehicles were in your ordinary operations as Investigator, and you did not make a special check? That does not mean that these were the number in your territory, but the ones you happened to run up on?

A. Yes.

Colloquy Between Commission and Counsel

Mr. Seibert: If the Commission please, you will remember that at the beginning of the case I stated that Mr. Randolph Harrison and I had tentatively considered that we might agree on a line of demarcation where it might be considered interstate and where our investigators would not pick up these people, and I also stated that if he would go to his people and take the matter up with them, I would take it up with the Commission and get them to decide the issue, and in order for the Commission to have what was in our minds, I felt that we should state that there were some shipments that were moving normally through Roanoke, and on those shipments it was our thought—and, of course, I had no right and have no right now to say that the Commission would consider that what we thought was right—but that from Roanoke we would consider the main Highway No. 19 and 460 running through North Tazewell and thence 19 to a connection with Highway 82 and thence

[fol. 29] over Highway 71 to Dickinson County, and thence through Highway 58 through St. Paul to Norton and thence Highway 23 to the Kentucky State Line, on that line we would consider a shipment interstate or intrastate north of that line. If the shipment was handled by the Service Storage & Transfer Company, we would not pick him up and bring him before the Commission.

Commissioner Hooker: That was the dividing line?

Mr. Seibert: That would be the dividing line, if accepted by the Commission, not as a legal question, but in that territory our investigators would allow them to go.

Commissioner Hooker: And south of that would be an abnormal operation?

Mr. Seibert: South of that would be an abnormal operation.

Commissioner Catterall: But on Route 19 you would let them go ahead?

Mr. Seibert: Any of the shipments on that would be intrastate or interstate, but I only stated that it would be considered.

Commissioner Hooker: Do they have a certificate of regular route operation?

Mr. Seibert: Here is Exhibit 4 in the previous case, No. 13074, which is their certificate of public convenience and necessity, and it reads: "General commodities, except those of unusual value, and except dangerous explosives, household goods as defined in "Practices of Motor Common Carriers of Household Goods," 17 M.C.C. 467, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading, over irregular routes.

"Between Bluefield, Va., Bluefield, W. Va., and points and places within five miles of Bluefield, W. Va.

"Between Bluefield, Va., and points and places within five miles of Bluefield, Va. and those within five miles of Bluefield, W. Va., respectively, on the one hand, and, on the other, points and places in that part of Virginia and West Virginia within 75 miles of that territory.

"Between Bluefield, W. Va., on the one hand, and, on the other, points and places in West Virginia, that part of Virginia west of U. S. Highway 29 and south of U. S.

Highway 60 including points and places on the indicated portions of the highways specified, and that part of Vir-
[fol. 30] ginia north of U. S. Highway 60 which is within 80 miles of Bluefield, W. Va."

Here is what happened. Under the ruling of the Interstate Comerce (sic) Commission, Bluefield is the terminal point, and they can bring anything into Bluefield from this territory.

Commissioner Hooker: Providing it is from outside of the State.

Mr. Seibert: Yes, and serve anywhere from 75 miles. That is the position taken by Mr. McInerny.

Commissioner Hooker: That does not mean that they can take a shipment at Bluefield, Virginia and move it to Tazewell. That certificate is to protect competing carriers to and beyond that zone who already hold interstate authority.

Mr. Seibert: That is a matter for the interpretation of the Commission.

Commissioner Hooker: But that does not give them authority to transport a piece of freight from Bluefield to Tazewell intrastate.

Mr. Seibert: It would not authorize from Bluefield, Virginia, but they can from Bluefield, West Virginia into this territory. You will notice it says:

"Between Bluefield, W. Va., on the one hand, and, on the other, points and places in West Virginia, that part of Virginia west of U. S. Highway 29 and south of U. S. Highway 60 including points and places on the indicated portions of the highways specified, and that part of Virginia north of U. S. Highway 60 which is within 80 miles of Bluefield, W. Va."

After reading that certificate, we thought we could use a mile south of that, for the traffic coming from points on U. S. Highway 29 and south of U. S. Highway 60, but, if this has to go through Bluefield, I can only agree now to this particular line here, because it has to go through Bluefield.

Commissioner Hooker: That must be the normal route for it to be transported.

Mr. Seibert: It must be the normal movement through Bluefield, West Virginia.

Commissioner Catterall: No back hauls.

Mr. Seibert: No, sir.

[fol. 31] Mr. McInerny: I don't want to impose on the Commission, but——

Commissioner Hooker: They have ignored the agreement by going ahead and operating over it.

Mr. Seibert: There was no agreement, but it was to be submitted.

Mr. McInerny: May I clarify that?

Commissioner Hooker: I don't consider it necessary.

Mr. McInerny: Mr. Harrison felt compelled to refer it to the Interstate Commerce Commission, and, after we did that, we again proposed, by letter of October 24, 1956, I think counsel has a copy of that, and I would like to have that added to the record.

Commissioner Hooker: It is in the record.

Mr. McInerny: It is part of the Commission's record?

Commissioner Hooker: Yes, October 22, 1956.

Mr. McInerny: My letter is dated October 24, 1956, and includes copies of letters from the Interstate Commerce Commission.

Commissioner Hooker: Proceed with the evidence.

Witness stood aside.

W. C. ECHARD, a witness introduced on behalf of Defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. McInerny:

Q. Mr. Echard, please identify yourself, stating your full name, the name of the company with which you are associated, and the position you hold with that company.

A. I am W. S. Echard, Bluefield, West Virginia. I am General Manager of the Service Storage & Transfer Company, Inc.

Q. Would you outline the scope of your duties as General Manager.

A. Well, I manage the operation of the Service Storage & Transfer Company, at the Home Office, which is Bluefield,

West Virginia, and their outlying territories I supervise the operations of, also.

[fol. 32] Q. Do you actively have supervision of the operations and details of the running of the company?

A. I do.

Q. For how long have you been associated with the Service Storage & Transfer Company?

A. Four years.

Q. Prior to that time did you have any experience in the motor carrier field?

A. Yes.

Q. How long was that?

A. Fifteen years.

Q. Since the time you have been associated with Service Storage & Transfer Company, has it held identically the same authority from the Interstate Commerce Commission as it presently holds?

A. Yes.

Q. At the time you went to work for Service Storage & Transfer Company, did you happen to have the opportunity to examine the books and records of the company which reflected their past operations?

A. Yes, sir.

OFFERS IN EVIDENCE

Q. We have mentioned a certificate which the company holds from the Interstate Commerce Commission. Do you have a copy of that before you?

A. I do.

Mr. McInerny: May I have this identified as the next exhibit?

Commissioner Hooker: It will be received as Exhibit No. 2.

By Mr. McInerny:

Q. Do you have with you also a copy of the map which pictorially reflects the authority set forth in Exhibit 2?

A. Yes, I do have.

Mr. McInerny: May I have this identified, Mr. Commissioner?

Commissioner Hooker: That will be received as Exhibit No. 3.

[fol. 33] By Mr. McInerny:

Q. Would you refer to the certificate, sir, and, looking at the second paragraph under the first commodity description, would you indicate what that authority authorized your company to do, as you have been advised by the Interstate Commerce Commission, just the second paragraph.

A. It authorizes us to move freight between Bluefield and points and places within five miles of Bluefield, West Virginia.

Q. Bluefield, West Virginia?

A. West Virginia, on one hand, and points and places within five miles of Bluefield, West Virginia, and between Bluefield, West Virginia, on the one hand, and on the other points and places in West Virginia and that part of Virginia west of U. S. Highway 29 and south of U. S. Highway 60, including points and places on the indicated portions of the highways specified and that part of Virginia north of U. S. Highway 60 which is within eighty miles of Bluefield, West Virginia.

Q. I believe you referred to the third paragraph, but go back to the second paragraph and advise what that allows you to do.

A. "Between Bluefield, Va., and points and places within five miles of Bluefield, Va., and those within five miles of Bluefield, West Virginia, and deliver it to other points, either other, points and places in that part of Virginia and West Virginia within 75 miles of that territory."

Q. For clarity and ease of disposition, do you conduct operations under those two authorities by interchanging with yourself, so to speak?

A. Yes, we do.

Q. In other words, you pick up traffic in Virginia under the second paragraph and bring it through Bluefield, West Virginia, and deliver it to other points, either in Virginia or West Virginia, described in the third paragraph?

A. Yes.

Q. And you use those two authorities in combination? Is it correct to state that it is something like two carriers interchanging, one with the other, although in this case both are owned by the same carrier?

A. Yes, I would say it is almost identical to that.

Q. Can you refer to the map before you and, take Lynch-
[fol. 34] burg, for example, that is on the authority you have described in the second paragraph; is that correct, sir?

A. That is correct.

Q. And you would pick up a shipment there and bring it to Bluefield, West Virginia, and when you got it there you would put it on the authority, so to speak, described in the second paragraph and deliver it to the point, say a point like Draper, which is one of the points at issue in this proceeding?

A. That is right, sir.

Commissioner Hooker: Do you know that of your own knowledge?

A. I know that of my own knowledge. That is the only way we operate.

Q. You do know that of your own knowledge?

A. I have documents to prove it.

Q. That is the only way you know it, because of the documents you have?

A. Yes, I did not follow the particular shipments.

By Mr. McInerny:

Q. In the practice of your company in the keeping of its books and records where you have traffic moving from one Virginia point to another point, how do you, as General Manager of the company, ascertain that the Bluefield, West Virginia, gateway is observed on traffic moving from Roanoke to Southwestern Virginia; do you have books and records to reflect that?

A. We have a standard operational procedure that directs all operations, and we expect all employees, of course, to follow those operation procedures, and in that operating procedure, it explains what has to be done with a shipment from origin to delivery.

Q. Are these documents the ones that are required to be kept by the Interstate Commerce Commission, such as your delivery receipts and manifests?

A. Yes, sir.

Q. And are those dates stamped upon receipt by your driver?

A. Yes.

Q. And upon receipt by the driver of the delivery, is the delivery stamp put on those?

[fol. 35] A. Sometimes the driver does write the date, but we do have a delivery stamp. When the driver checks in from his run, then that is stamped on the date of the delivery.

OFFER IN EVIDENCE

Q. Did you prepare at my request an outline of the information concerning employees and equipment and company location?

A. Yes.

Q. Have you a copy of that before you?

A. Yes.

Mr. McInerny: May I have this marked Exhibit 4.

Commissioner Hooker: That will be received as Exhibit No. 4.

By Mr. McInerny:

Q. Did you prepare this or have it prepared under your supervision from the books and records of the company?

A. Yes.

Q. Would you describe what your ternimal (sic) operations are, first, at Bluefield, West Virginia?

A. Well, we operate a total of 74 pieces of equipment at that terminal; a passenger car; one pick-up truck, two open-topped straight trucks, eleven van straight trucks, twenty-two tractors, eight open-topped trailers, and twenty-nine van trailers.

Q. In the use of that equipment, do you conduct what is known in the trade as "peddler runs"?

A. Yes.

Q. Under what arrangement do those peddler runs expand from your Bluefield, West Virginia terminal? Do you have fixed areas of operation radiating out of Bluefield?

A. I would not say they are "fixed," but we do have operations on peddler runs within a radius around Bluefield operating through the Bluefield terminal.

Q. In addition to your peddler runs, do you have what might be described as "over the road" operations between Bluefield and your other points?

A. Yes.

Q. What is the limitation of that operation of those at Roanoke and Bluefield, West Virginia? Can you give us a pattern of your operations?

[fol. 36] A. We operate, of course, and dispatch trucks from the Bluefield terminal to Roanoke.

Q. What is the consist of those generally; can you describe the traffic it serves?

A. Less truckload shipments. A very small percentage of it is truckload.

Q. And when the vehicle arrives at Roanoke, with the vehicle consisting of less truckload shipments, what disposition is made of it?

A. It is broken down in the terminal at Roanoke and loaded on the peddler run trucks and delivered into the local area.

Q. On operations from your Roanoke terminal back to the Bluefield terminal, would that be substantially the same as you have described in the eastbound delivery to Roanoke?

A. It is practically the same, with this exception, that, of course, they dispatch the over-the-road trucks or trucks pulling the freight from Roanoke to Bluefield, and, of course, when they are broken down at Bluefield we are also receiving shipments from all other trucks over the roads that Service Storage & Transfer Company operate over, and all of that is combined at Bluefield and filed out to the other terminals and also for peddler runs out of the Bluefield terminal.

Q. On traffic moving from Roanoke to Bluefield, West Virginia, is it broken down, so to speak, and mingled with other traffic arriving from other over-the-road points, such

as Charleston, West Virginia and Huntington, West Virginia?

A. Yes.

Q. Do you make up complete loads from the consist of the two movements and dispatch it to the Southwest Virginia points?

A. Yes.

Q. Will you describe what the relationship is between your Bluefield, West Virginia terminal and Bristol, Virginia terminal?

A. Well, we dispatch tractor trailer units from the Bluefield, West Virginia terminal to the Bristol terminal for the freight to be delivered in the Bristol area.

Q. What do you describe as the "Bristol area"? What area do you find most effectively served out of Bristol?

A. The adjacent area to Bristol and Southwest Virginia and Kentucky.

Q. Could you describe it by reference to the map, sir? [fol. 37] A. Our Bristol terminal delivers out Route 58 through the southwest portion of Virginia, on back into that area, and they deliver up to, I guess, near Saltville. We will deliver to Saltville either out of the Bluefield or the Bristol terminal, depending on which has the heavier flow of freight, and Saltville and St. Paul are the breaking points for the two terminal delivery points.

Q. And do I understand that the traffic north of that line you have just described is generally handled out of the Bluefield terminal direct?

A. Yes.

Q. At this point I think it might be helpful to refer to the shipment of November sixteenth that Mr. Kinzer discussed. The bill he has duplicated shows it was a movement from Double Envelope Corporation, located in Roanoke, Virginia destined to the First National Bank of Norton, Virginia. From his evidence it would appear that the traffic may have been handled first at the Bluefield, West Virginia gateway and then by your Bristol terminal. Can you explain, based on your knowledge of your own company's operations, what in all likelihood happened in the transportation of that shipment, from origin to destination?

A. It would move from Roanoke to Bluefield, West Virginia, along with other shipments to make up a load. If we

have too much freight, which we usually do, in that load of freight there is probably freight consigned to Charleston and numerous other places.

Q. Charleston, West Virginia?

A. Yes, and Beckley and beyond, but it is broken down at Bluefield, and the freight from Bristol will be loaded on a Bristol truck for the Bristol area, and we will move it from Bluefield, West Virginia to the Bristol terminal with a tractor-trailer, and there it will be broken down and loaded on the peddler run trucks for the area to which it is to be delivered.

Q. Since the time you have been with the company, has your company consistently held itself out in the same pattern to perform the same type of operations, or has there been any change in the recent past?

A. There has been no change in the recent past, until the quite recent past, as of November first.

Q. Prior to the time you came with the company, do the records of the company reflect, on your investigation of [fol. 38] them, Mr. Echard, whether the prior owners were conducting operations from one Virginia point to another Virginia point through Bluefield, West Virginia?

A. Yes, they did.

Q. And during the four years' time you have been with the company, have you held yourself out as willing to do that and have you done it?

A. We have.

Q. Can you state from your knowledge of your company's operations whether all traffic movement from one place of authority to another place of authority in your certificate actually observes the Bluefield, West Virginia gateway?

A. Definitely, it does. It is the only way we can handle the freight, because all of our billing is done at Bluefield, West Virginia, because we have no other facilities at any other terminal to do it.

Q. I ask you whether there has been any investigation by the Interstate Commerce Commission or other officials with respect to your observing the legal procedure with regard to this operation?

Mr. Seibert: I don't think that is material.

By Mr. McInerny:

Q. There has been reference to the fact that routes on some of the freight carried by you are more circuitous than other routes. Do you agree that some of your traffic moves over highways that are less direct than the most direct routes?

A. Yes.

Q. Do you have that sort of traffic between Virginia and West Virginia, on the one hand, as well as traffic to Virginia points?

A. Yes.

OFFER IN EVIDENCE

Q. At my request, did you select some typical illustrations of traffic handled, first, between the point in Virginia on one hand and the point in West Virginia on the other?

A. Yes, I did.

Mr. McInerny: May that be marked as the next exhibit?

Commissioner Hooker: It will be received as Exhibit No. 5.

[fol. 39] By Mr. McInerny:

Q. Would you explain that exhibit; first, it indicates that from Covington to Beckley on the most direct highway is 98 miles, and as you operate it from Bluefield it is 156 miles. Notwithstanding your circuitous route, are you presently engaged in handling traffic from Covington to Beckley?

A. Yes, we are.

OFFER IN EVIDENCE

Q. Did you also make an analysis showing a comparison between mileages required to be traversed in serving representative points?

A. Yes, I did.

Mr. McInerny: May I have that marked as the next exhibit?

Commissioner Hooker: That will be received as Exhibit 6.

Mr. Seibert: So far as Exhibit 5 is concerned, I have not objected to it. I don't think it is material to this case. We

are not interested in what West Virginia does or does not do.

By Mr. McInerny:

Q. In preparation of Exhibit 6, Mr. Echard, would you state what maps you used as references?

A. We used the Virginia official map.

Q. And do these figures show the direct highway mileage first in the left-hand corner?

A. Yes, the direct mileage is in the lefthand corner.

Q. The first item is Roanoke to Tazewell, and it shows the mileage directly as 131 miles, and the mileage as you operate it is also 131 miles?

A. That is right.

Q. Are there any other similar situations, other than those shown on that exhibit that you could identify, points in the Tazewell area?

A. You mean give the mileage?

Q. No, name the towns.

A. Well—you mean in the Tazewell area?

Q. Yes.

A. There would be North Tazewell and South Tazewell, which is the same town, but there is no other town close to Tazewell that we serve.

Q. What was the purpose of developing the information shown on Exhibits 5 and 6?

[fol. 40] Mr. Seibert: If he is going to give any value to Exhibit 5, I ask that it be withdrawn.

Mr. McInerny: I didn't know that there was objection to it.

Commissioner Hooker: What is the purpose of it?

Mr. McInerny: One of the purposes is to show that we are operating in good faith, and it was indicated by Counsel for the Commission that the circuitous mileage alone is one of the elements to be considered, and we are trying to show good faith, and it is shown that the Interstate Commerce Commission operations from one state to another, where we are operating on a circuitous route, that these routes do not govern the practical feasibility of the movement. I will develop that operations can be conducted circuitously in

regard the less truckload traffic, and the operations to West Virginia is no different than that conducted between Virginia points.

Commissioner Hooker: I don't see that West Virginia has any bearing on Virginia, and you all have agreed that the highway map which indicates the distance is the one to be used.

Mr. McInerny: I had done that, but before I did that I had prepared this statement.

Commissioner Hooker: You can put them in, and if they have any value we will give them consideration.

By Mr. McInerny:

Q. Will you state, Mr. Echard, as it relates to your operations, what effect, if any, does circuity in the operation, some excess mileage, as reflected in the exhibit, what effect that has on the feasibility or practicability and profitability of your company's operations.

A. Even though we could take a more direct route if we were going to move a shipment from one point to another point, the feasibility of it is to move freight into the "break bulk point" and fan out from that point the freight going to other areas, combining freight from Charleston, Covington, Beckley, and Roanoke at Bluefield and moving it into the Bristol terminal for handling there.

Q. In other words, do I understand your testimony to mean that, because there is a volume of less truckload traffic, you can handle other shipments without making your shipments unprofitable or impractical?

[fol. 41] A. Yes. If you could move it down 11 from Roanoke to Bristol, which we can't do legally, but if we could, so far as our operation is concerned, it would give better service to move it through Bluefield because of the flow of freight.

Q. What do you mean by "flow of freight"? Do you mean the flow of freight from Bluefield?

A. We have 4,000 pounds from Roanoke to Bristol, for example, and we move that 4,000 pounds with other freight in trailer loads to points west and southwest to Bluefield, and when you get to Bluefield that 4,000 pounds will move

in conjunction with other freight we combined to Bristol in truckloads.

Q. And if it were to move directly from Roanoke to Bristol, it would move simply at a 4,000 pound shipment?

A. It would move as a 4,000 pound shipment, or you could not move it until you had another shipment, which would delay the shipment.

Q. There would not be enough traffic to justify the operation?

A. That is my view.

OFFERS IN EVIDENCE

Q. Did you prepare some information as to how much of your company's traffic consists of movement from one Virginia point to another Virginia point, as contrasted to your other operations?

A. Yes, I did.

Q. Will you state what period that covered?

A. One period was from June 18, 1956 and ending June 23, 1956. The other period was beginning August 13, 1956 and ending August 18, 1956.

Mr. McInerny: May I have those marked as exhibits?

Commissioner Hooker: They will be received as Exhibits 7 and 8.

By Mr. McInerny:

Q. Are these weeks fairly representative of your entire year's operation as they are broken down, percentagewise?

A. I think so. I tried to get it that way.

Q. Would you indicate whether or not the three per cent of all shipments shown on Exhibit 7 would fairly reflect the total your company handles in the period of a year?

A. Yes, sir, that is what my figures reveal, and I think that is right.

[fol. 42] Q. And does that reflect also the amount you have handled since you have been with the company? Is it your opinion that you have handled just about that amount?

A. Somewhere around that; probably close to that.

Q. Does your company do any advertising in the Virginia

area showing that you hold out your service from Virginia points to another Virginia point to the shipping public?

A. Certainly not.

OFFERS IN EVIDENCE

Q. Does your company distribute what is known as "routing guides"?

A. Yes.

Q. Do you have a copy of those with you?

A. I have a routing guide which we supply the Roanoke terminal with.

Q. Are those distributed to shippers in the area?

A. Yes.

Mr. McInerny: I have these available for exhibits, but they are so bulky that, if we could explain the purpose of bringing them without offering them, I think it would be well.

Commissioner Catterall: It stands to reason you would not have the movement unless you advertised for it.

Mr. McInerny: We have the demand from the shipper.

Commissioner Hooker: The shipper is not supposed to know whether you are violating the law or not.

Mr. McInerny: We are aware of that, but I want to show that we have the demand, and I want to show Counsel and the Commission——

Commissioner Hooker: Put it in as Exhibit 9.

By Mr. McInerny:

Q. You have the first one as the routing guide at Bristol?

A. No, this is Roanoke.

Commissioner Catterall: Is this to prove that, because the shippers want the service, it makes it legal?

Mr. McInerny: No, the only purpose is to show what the carrier holds out, and it states in the first page of the guide that it is only applicable on interstate traffic, and the shippers are advised that this traffic goes through Bluefield, West Virginia, and there is no holding out to shippers that this traffic moves from one point in Virginia to another point in Virginia. I want to show that it is moving on interstate bills of lading and charges.

[fol. 43] Commissioner Hooker: I don't see how that would be material.

Mr. Seibert: It was admitted in the letter.

Commissioner Hooker: The shipper has no responsibility in this matter.

Mr. McInerny: Without putting in the exhibits, may I have it conceded that that is a fact?

Commissioner Hooker: File it for what it is worth, if it is worth anything.

Mr. McInerny: May we have them marked?

Commissioner Hooker: They are filed for what they are worth.

By Mr. McInerny:

Q. Are the routing guides to which we have just referred the type of material that you distribute, or your terminal employees distribute, to the shippers in the area?

A. Yes, sir.

Q. Do those materials contain information that all traffic moving between points shown in the routing guide must move in interstate commerce?

A. Yes.

Q. On what page is that shown?

A. The first page.

Q. And what is the language?

A. "Applicable only on interstate traffic."

Mr. Seibert: I don't think the shipper is interested in whether it goes interstate or intrastate.

Commissioner Catterall: Does he not have to pay more if it goes interstate?

Mr. Seibert: Sometimes he does, and sometimes he does not.

Commissioner Hooker: If you want to mark those filed as exhibits, we could have them filed as Exhibits 9 and 10. Let them go in as Exhibits 9 and 10.

By Mr. McInerny:

Q. How long have you circulated such routing guides to the shipping public your company serves?

A. For the entire period I have been there, but, of course, the guides I first used were carried over from the other company, the original owners, and we have been preparing this type of guide for about three years.

[fol. 44] Q. And all the traffic moving, without regard to under what authority it is moved, the charges are based on tariffs filed with the Interstate Commerce Commission, are they not?

A. Yes, sir.

Q. At my request, did you prepare from your original records photostatic copies of the delivery receipts and manifests covering the shipments referred to in the Rule issued by the Commission?

A. Yes.

Q. And do you have those with you in the Hearing Room?

A. Yes.

Q. And do you also have for counsel's inspection the originals from which these were photostated?

A. I do.

Q. Will you refer to the first one, the shipment moving from Roanoke, Virginia to Glen Lyn, Virginia, and indicate how you can be assured that all of this traffic comes through Bluefield, where it is broken down and redisbursed from Bluefield?

A. Freight that is loaded at the Roanoke terminal is loaded from the bill of lading. Since we do not do any billing at any terminal except Bluefield; we do billing only at the Bluefield, West Virginia terminal. There is a manifest made up at the Roanoke terminal showing the shipment, the consignee and the consignor's address, and it carries the bill of lading number on that shipment on this manifest.

Q. Then, when the shipment arrives at the Bluefield, West Virginia, terminal, is it marked with the terminal stamp of any type?

A. Yes, it is marked with a stamp showing the date received and what terminal received it.

Q. And does that practice assure your company and you personally that the traffic involved does move through Bluefield, West Virginia, on each occasion?

A. Yes, sir.

Q. You understood, as General Manager of your Company, that there has been a past controversy as to the type of business your Company is conducting from one Virginia point to another?

A. Yes.

Q. And you further understood that under one Rule the Company had paid a fine and no further action was taken, did you not?

A. Yes.

[fol. 45] Q. Then the second Rule was issued, the one involving these shipments today, and you knew that there was some discussion by Mr. Harrison with this Commission?

A. Yes.

Q. Were you advised, or did you advise your people, with respect to what traffic they could continue to accept at various terminals moving from one Virginia point to another and which traffic they would be required to reject?

A. Yes.

Q. When did you issue those instructions to your terminal employees, the approximate date?

A. Right around November first.

Q. So far as you know, is there any traffic moving now via Service Storage & Transfer Company from one point in the contested Virginia area to another point in the contested Virginia area?

A. Not to my knowledge, Sir. To my knowledge, there may have been some shipments the driver picked up in error, by not understanding what he could and could not pick up, and it was returned to the shipper.

Q. In addition to informing your employees as to what traffic they could accept in the future, pending the disposition of this case, did you also have them advise the shippers who had previously used your service from one Virginia point to another Virginia point?

A. Yes.

Q. How many shippers, in all, did you advise, and how did you advise them?

A. We advised them through the terminal managers, and I personally called on quite a few of them.

Q. What was the reaction of the shippers generally?

A. They insisted that we continue to move the freight and wanted us to move it.

Q. Did you inform them of the pendency of this proceeding?

A. I did.

Q. And, notwithstanding their desires for the transportation of their freight, have you declined all that we determined to be objectionable?

A. Yes.

Q. Referring again to the documents which you have before you, to the manifests which accompany the freight [fol. 46] bills in each case, do they show the preponderance of traffic handled is moving in interstate commerce, that is, between a Virginia point on the one hand and an out-of-state point on the other hand?

A. Very definitely.

Q. Have you been advised by any member of the shipping public as to what action they took, if any, as to being informed as to the Commission's hearing on this rule?

Mr. Seibert: I don't believe information as to what action the shipper would or would not take or what action the shipper believes is legal or not has anything to do with this matter, and I object to the question.

Commissioner Hooker: The objection is sustained.

By Mr. McInerny:

Q. The two shippers that have an interest in this proceeding accompanied you to the Hearing Room?

A. Yes.

Q. And is the testimony to be offered through them substantially identical to the communications of other shippers that you have seen sent to the Commission?

Chairman King: That is not relevant.

Commissioner Hooker: The shippers could not possibly have anything to do with this case. They might be interested in the service, but that is not the issue before us.

Mr. McInerny: I understand that there is no question of convenience and necessity, but the reason I thought it advisable to have a group of shippers appear was to state that they intended it to be interstate, that they knew it was

interstate, that they intended to ship it interstate, and their intention certainly has something to do with the matter.

Commissioner Hooker: Their intentions do not change the law.

Mr. McInerny: Their intentions according to the Interstate Commerce Commission's law.

Mr. Seibert: It is not the intention of the shipper that is the governing point, but the law.

Mr. McInerny: On those cases where shipments move from one state to another state or where the original consignor had the intent of interstate shipment, that certainly [fol. 47] has a bearing on whether the traffic is interstate or not; and that was the purpose I had in having the two representatives here, both of which have this understanding.

Commissioner Catterall: How about that case in Chicago where one of those shippers there said it was interstate commerce, and the shipment went all the way to California? I don't see how they could throw any light on this case whatever.

Commissioner Hooker: I don't suppose the shippers care whether it goes interstate or intrastate. They just want to get their goods delivered where they send it.

1:00 P. M. Commissioner Hooker: The Commission will recess for lunch until two o'clock.

2:00 P. M. The Commission resumes its session.

Mr. McInerny: May I make inquiry on one or two other elements before I tender him for cross examination?

Commissioner Hooker: Certainly.

By Mr. McInerny:

Q. Mr. Echard, your Company at one time participated in the movement of certain traffic originating in Richmond, Virginia and destined to Tazewell, Virginia, did it not?

A. Yes.

Q. What did that traffic consist of?

A. It was foil moving from Reynolds Metals to the Micamold Corporation at Tazewell.

Q. Can you identify the character of the carrier or carriers that originated the traffic at Richmond?

A. Yes, it was Wilson and Brooks.

Q. And at what point did you receive that traffic?

A. Roanoke.

Q. And did you move it, then, from Roanoke through Bluefield, West Virginia, to destination?

A. Yes.

Q. Can you give me an estimate of the total mileage traversed from Roanoke to Tazewell via the route you employed?

A. 130 miles.

Q. Were you advised that that shipment was regarded by officials of the State Corporation Commission as an intrastate movement?

[fol. 48] A. No, I was not advised.

Q. Did you receive information that led to the cessation of that movement by your Company?

A. Yes.

Q. Where did you receive that information?

A. From the manager of the Micamold Corporation at Tazewell.

Q. Look at the map, sir, and indicate generally, first, the mileage by your route, and, secondly, the mileage via the most direct intrastate route, without regard to whether or not the carrier is authorized to serve over the most direct intrastate route. Beginning at Roanoke, will you trace the highway.

A. We would follow from Roanoke, Virginia, Route 460 to Bluefield, West Virginia.

Q. And that is 130 miles?

A. No, not from Roanoke. It is 107 miles.

Q. And what is the distance from Bluefield to Tazewell?

A. Approximately twenty to twenty-one miles.

Q. On the so-called "normal" or most direct routing, wholly within the State of Virginia over highways—it would be traversed beginning at Roanoke, because that is the point you picked it up; isn't that correct?

A. That is correct. It would be Route 11, in my opinion, to Wytheville, and then Route 52, I think. There is some question in my mind as to what highway you could travel, and I presume you would probably have to travel over Route 263.

Mr. Seibert: You take 11 to Wytheville, 52 to Rocky Gap, and 61 to Burks Garden, and then to Tazewell.

A. Yes, when 61 is completed. I don't believe it is completed all the way now, but when it is completed that would be the normal route.

By Mr. Seibert:

Q. Would that be the logical route?

A. If you were staying wholly within the State of Virginia.

By Mr. McInerny:

Q. Based on the knowledge of the distances you have given, what do you conclude as to the relative distances, first, the routes you traversed there and, secondly, the route wholly within the State?

[fol. 49] A. I think it would be better to go over our route than over the all-Virginia route.

Q. Your routing would be more normal or more direct, in your opinion?

A. Yes.

Q. How long did you participate in that traffic, if you remember?

A. Approximately a little better than a year, I believe.

Offer in Evidence

Mr. McInerny: If the Commission please, I do desire to submit these documents as exhibits, because they give the details, but, if I may have your permission, I would prefer to have them in somewhat better order and also retain a copy for my files. May I submit them as late-filed exhibits?

Commissioner Hooker: Exhibit 11 will be reserved for them.

By Mr. McInerny:

Q. With respect to the aluminum foil movement we have just discussed, do you desire to participate in that movement?

A. Yes.

Q. And would you participate in it if the shipper had not been advised to cease the movement from Richmond with your Company and have it shipped by a carrier from Richmond?

A. Yes, we would continue to handle it.

By Mr. Seibert:

Q. In connection with this Tazewell movement, you were informed that the shipper, and the shipper also was advised that you could not handle it to Tazewell, and were you informed that the shipper was informed that the matter was before the Commission and that he had been informed that you had been advised that that shipment would be considered an intrastate shipment?

A. No.

Mr. McInerny: We did have correspondence, and I have no objection to your reading the letters of ours in which they advised Mr. Harrison concerning the movement.

Mr. Seibert: And they were advised that until the matter was definitely determined by the Commission we would have to stick to our original ruling, or something to that effect.

[fol. 50] Mr. McInerny: Yes, I have a duplicate of that letter. It is very illegible, but this is, in effect, what was said. I believe you concluded in your last paragraph:

"Tazewell can very easily be handled from Roanoke intrastate, and in view of the case pending before the Commission, it should resolve this whole question, and I would not like to make any change which would have any bearing on that case."

That is signed by Mr. Seibert and addressed to Mr. Harrison of Smith's Transfer Corporation.

Cross examination.

By Mr. Seibert:

Q. Now, in connection with this map which you filed as an exhibit showing your routes, I believe you say that

you have certain rights supported by a copy of your certificate issued by the Interstate Commerce Commission for delivering at points within your route?

A. Yes, I would say that is correct.

Q. Is Rocky Mount, Virginia, a point within your rights?

A. Yes.

Q. Now, if you had a shipment, would you think you could handle a shipment from Danville to Rocky Mount?

A. Yes, I think I could.

Q. How could you take it?

A. To Bluefield, West Virginia, and back to Rocky Mount.

Q. And you would consider that to be good service?

A. I would consider it to be good service, if properly handled.

Q. One of the shipments referred to in the Commission's Rule, in fact, two of them, are from Bristol Steel and Iron Company, Bristol, Virginia, to Wise County Courthouse, and your statement shows that the distance direct is 175 miles and the mileage through Bluefield is 267 miles.

A. Yes, I agree with that.

Q. Do you say you can handle shipments for 267 miles as cheaply and as well as you can for 175 miles?

A. No, certainly not, if you put it that way; you can [fol. 51] handle one shipment for so many miles at so much money. I would not say that you can handle it as cheaply.

Q. You hold yourself out as a common carrier to handle freight as cheaply and with as good service as possible?

A. If it is handled with other freight, it is.

Q. I did not say that, but you hold yourself out, from Bristol to Wise, to handle that?

A. Yes.

Q. How do you base your costs?

A. On mileage.

Q. What is your average mile cost?

A. Forty-six cents, approximately. That was what it was the last time I checked.

Q. And you use that as a rate base and base for any other purposes?

A. Not necessarily as a rate base.

Q. What do you use it for; isn't that a part of your rate base?

A. Certainly as a part of it, yes.

Q. Do you think you could handle a shipment from Bristol to Norton, 70 miles, as cheaply as you could for 262 miles?

A. That would depend on the operation.

Mr. McInerny: May it please the Commission, in the form the question is in, it is not complete. In his direct examination he testified that there was a difference in handling less truckload traffic and truckload traffic. If the question is conditioned so he can explain the less truckload traffic and through traffic, he has a right to do that.

Mr. Seibert: This is a less truckload movement, and he holds himself out as a common carrier, and he would have to handle one shipment from Bristol to Norton if he was so instructed; isn't that right?

A. Yes, if that was all the freight we had moving?

Q. Now, this circle here is an 80-mile circle?

A. That is right.

Q. In the western part I notice a green and red circle and then another green circle. What is the green circle?

A. The green circle represents the eighty miles from Bluefield.

[fol. 52] Q. The western edge?

A. Yes.

Q. Where is Big Stone Gap?

A. It is beyond the eighty miles.

Q. Do you have any rights to serve Big Stone Gap?

A. Yes.

Q. Why?

A. Big Stone Gap is included in the authority west of 29 and east of 60.

Q. Everything west of that can be served?

A. Yes.

Q. From Bristol, Virginia, to Big Stone Gap, do you have any authority to serve that?

A. Yes.

Q. What is the basis of it, going through that way?

Mr. McInerny: I object to that.

Mr. Seibert: I am asking him in regard to a shipment from Bristol to Big Stone Gap. I am asking if he had a shipment from Bristol to Big Stone Gap, and I asked him how he would handle it.

A. If it moved out of Bristol, it would be moving from Bristol to Bluefield by tractor-trailer unit.

Q. Under what authority?

A. Under this authority. Bristol is within the eighty-mile authority.

Q. But that does not say you have to take it to Bluefield for the terminal point and deliver it to another point in the State. You can haul within an eighty-mile radius without connecting with the other eighty-mile certificate. In other words, you take the position that you can haul everything west of 29 and south of 60 in Virginia; is that your position?

A. No. We can haul it in conjunction with the other certificates south of 60 and west of 29.

Q. How about a shipment from Lynchburg to Big Stone Gap? Can you haul that?

A. Yes.

Q. How do you do that?

A. From Lynchburg to Bluefield, West Virginia, and then from Bluefield, West Virginia to Big Stone Gap.

Q. And that is in the two parts of your certificate. You [fol. 53] say you have the right to connect the two certificates together?

Mr. McInerny: May it please the Commission, I don't want to interfere with the interrogation of the witness, but we believe on this certificate that he has the rights on shipment from Lynchburg to Big Stone Gap. Lynchburg is in this area in the third paragraph, within the meets (sic) and bounds of the highway. Let's assume he only has this authority from Bluefield, West Virginia there, on the one hand, and that portion of Virginia west of 29, there would be no question with respect to his authority to transport from Lynchburg to Bluefield, West Virginia. On the second phase of the operation he depends on the second paragraph.

between Bluefield, West Virginia, on the one hand, and, on the other, the points within 75 miles.

Mr. Seibert: That is the point I am making.

Mr. McInerny: If Big Stone Gap is within an air mileage radius of Bluefield, he would be entitled to serve it, but, as it appears from his own drawing, Big Stone Gap would be beyond the 75 miles then——

Mr. Seibert: He is the General Manager, and he said he would haul it. He does not know his own certificate. That is what I am trying to determine, whether he does or not. I asked him if he would handle a shipment from Lynchburg to Big Stone Gap, and he said, "Yes."

By Mr. Seibert:

Q. I think you said that on November first instructions were issued not to haul any more intrastate business, or such business considered as intrastate business; is that right?

A. I still did not restrict him in the area that Mr. Harrison sent me the map marked off.

Q. On the line I spoke of this morning?

A. Yes.

Q. That was November first? Do you know when the Commission's original order in the case became effective?

A. No, not entirely.

Q. You said you were entirely familiar with the Commission's original order in this case, and what was behind the Rule of July ninth. Did you not state that you knew about the order?

A. Yes.

Q. And that it was effective July ninth?

A. Yes.

[fol. 54] Q. Why did you wait until November first to issue the instructions? Did you not know you would be violating the Commission's order?

A. It was agreed by Mr. Harrison as to whether we would be in violation or not.

Q. You just eliminated that line a moment ago that I referred to. Why did you think the Commission's order was issued? Do you know why the order was issued?

A. I imagine I know why.

Q. Why?

A. For us to discontinue the operation was what the Commission desired.

Q. Don't you think it should have had some effect?

A. I still think it did.

Q. When?

A. As I told you, I thought Mr. Harrison and you——

Q. Do you think I have a right to disregard the Commission's order, or Mr. Harrison, either?

A. I am not questioning what right you or Mr. Harrison, either one, have.

Q. Let me ask you another question. A shipment from Clifton Forge to a point like St. Paul, how would that be handled?

A. From Clifton Forge it would move to Bluefield, West Virginia, and then to St. Paul.

Q. It would have to move through Bluefield, West Virginia?

A. That is right.

Q. Could you handle a shipment from Roanoke to St. Paul?

A. No, sir.

Q. Everything from all of this territory beyond the circle line must move first to Bluefield?

A. That is right.

Q. And they are your instructions?

A. Yes.

Commissioner Hooker: I want to ask you a question. You said something about "peddler service." What is "peddler service" as you define it?

A. It is a small truck on which we combine various shipments for a particular route, like where we loaded a truck in Bluefield, West Virginia, to deliver them to Welch and around in that area.

[fol. 55] Q. How far do you send those peddler trucks?

A. It depends on the shipment. They don't go the same route every day, and it depends on what we can load on the straight truck. Sometimes they have gone as much as seventy miles, and sometimes only forty miles, and sometimes only to Bluefield, West Virginia.

Q. Is it the purpose of those peddler trucks to take care of these shipments, these intrastate shipments?

A. The purpose of the peddler truck is to serve both intrastate and interstate movements that move wholly from places in Virginia to another place, or wholly in West Virginia. We have a movement between terminals which we call the "over-the-road movement," and the trucks that deliver to the customers in Bluefield and deliver to the customers down the highway, we call them "peddler runs."

Q. How far do you send that truck? Is it a small truck?

A. It is just a small truck. The beds are fourteen and sixteen feet long and standard width and cannot handle too much freight.

Q. Would you send the peddler trucks from Bluefield, West Virginia to Martinsville, Virginia?

A. Oh, yes, we do that.

Q. And was that the way the shipment went from Chilhowie to Martinsville?

A. Yes, I am reasonably sure that was what happened on that truck. We pick up freight at Chilhowie from points all over, and this truck must have originated at Bluefield and went out to peddle freight to Chilhowie and Saltville. We have daily pick-up service to Chilhowie, and as he went by Chilhowie he picked up a shipment from Martinsville, Virginia, so it was coming back into the terminal on a pick-up.

By Mr. McInerny:

Q. What it did was to come back to the terminal?

A. Yes.

Commissioner Catterall: To Bluefield, West Virginia?

A. Yes.

Commissioner Hooker: You mentioned service from Beckley, West Virginia to Covington, Virginia?

A. Yes.

[fol. 56] Q. How did you go on that?

A. From Covington to Bluefield, West Virginia, and then from Bluefield to Beckley.

Q. How does that route go out of Covington? Does it go to Clinchport?

A. It goes up on 60 west.

Q. West from Covington?

A. Yes.

Commissioner Catterall: You would not carry anything direct from Bluefield, West Virginia to Beckley, West Virginia?

A. Yes.

Q. That originated in Bluefield, West Virginia and terminated in Beckley, West Virginia? Do you transport goods between those two points?

A. We pick it up in Bluefield, West Virginia, and carry it to Beckley.

Q. How do you make that interstate commerce? Do you go from Bluefield, West Virginia back to Bluefield, Virginia and then back to Beckley? You are sure you do transport between the points of Bluefield, West Virginia and Beckley, West Virginia?

A. We haul freight between those points.

Q. Is that on freight originating in Bluefield, West Virginia?

A. No, we do not originate freight in Bluefield, West Virginia, and take it to Beckley.

By Mr. Seibert:

Q. Why don't you do it?

A. In our opinion, we don't have the authority.

Q. But you take it from Bluefield, Virginia to points in Virginia and say you have that authority. What is the difference?

A. By moving it across the State line.

Q. Can't you move this across the State line into Virginia?

A. That would not be the manner in which our certificate operates.

Q. I am trying to find your distinction. What is your distinction?

A. Freight originating in Bluefield, West Virginia going to Beckley would be an intrastate movement.

[fol. 57] Q. What would a shipment be from Bluefield, Virginia, to Tazewell, Virginia?

A. That would be the same.

Mr. McInerny: I desire to object to that, because I believe your question has an improper foundation.

Mr. Seibert: It is not anything of the kind. It is just intrastate traffic. He says from Bluefield, West Virginia to Beckley, West Virginia is intrastate. And from Bluefield, Virginia to Tazewell, Virginia is intrastate.

A. I said, if you move it from Bluefield to Tazewell, it is intrastate, but if you move it back to Bluefield, West Virginia, it is interstate.

Q. And I ask, if you take it from Bluefield, West Virginia, into Bluefield, Virginia, and then take it to Beckley, West Virginia, why isn't that interstate?

Mr. McInerny: May I object to that question? I don't want to object to the questions, because I think it might be informative to the witness, but I think that is not a proper question.

Commissioner Hooker: He has said it was intrastate. If you had a shipment at Richlands going to Tazewell, Virginia how would you carry that?

A. We would carry it from Richlands, Virginia, to Bluefield, West Virginia, and deliver it back to Tazewell.

Q. And you go right through Tazewell going to Bluefield, West Virginia?

A. Yes.

Q. And then you back haul into Tazewell?

A. Yes.

Q. At a distance of forty miles, twenty miles each way?

A. Yes.

Q. Why don't you think that is intrastate movement, when you go right through Tazewell from Richlands in going to Bluefield, West Virginia?

A. In my opinion, our certificate required us to take anything we had to Bluefield.

Q. Had you been told by counsel that if you carried it out [fol. 58] of the State and brought it back, that that would defeat the intrastate part of the law?

Mr. McInerny: I think that is an unfair statement.

Commissioner Hooker: Somebody has told him that, and I would like to find out who.

Mr. McInerny: I would like to make the statement, rather than the witness. I have previously advised him——

Commissioner Hooker: I want him to answer the question. Has anybody advised you that that would be outside of the State's authority?

A. I have certainly been advised that if it was moved in that manner, it was legal.

Redirect examination.

By Mr. McInerny:

Q. With respect to the construction of your certificate, does your company retain counsel and have its affairs, its interstate commerce affairs, submitted to counsel for advice?

A. Yes.

Q. And has someone connected with your Company, particularly Mr. Harrison, consulted counsel with regard to these matters from time to time?

A. Yes.

Mr. Seibert: What is Mr. Harrison's relation to this gentleman?

Mr. McInerny: Mr. Harrison is an officer of the Service Storage & Transfer Company of Staunton, Virginia. That carrier, under authority issued by the Interstate Commerce Commission, acquired all the outstanding stock of Service Storage & Transfer Company about four or five years ago.

Commissioner Hooker: You mean Mr. Smith of Staunton owns the stock of this Company?

Mr. McInerny: Yes, the Smith Transfer Company. It is an investment transfer on their books.

By Mr. McInerny:

Q. With respect to the question Mr. Seibert asked you concerning movements originating in Bluefield, West Vir-

ginia, and destined to Beckley, West Virginia, as I under-
[fol. 59] stand it on your certificate you have here, you only have one authority, one of these paragraphs relates to West Virginia; isn't that correct?

A. Yes.

Q. And that is the second paragraph?

A. Yes.

Q. And you have that part of Virginia and West Virginia within 75 miles of your terminal?

A. Yes.

Q. And you do not, and have not, as a matter of fact, handled any traffic shipped beyond origin and destination intrastate in West Virginia?

A. No.

Q. And the reason for that is that you only have one authority radiating from the Bluefield, West Virginia, terminal, in the State of West Virginia?

A. Yes.

Q. But you do have traffic moving from one authority to your other certificates, because you have overlapping authority in Virginia?

A. Yes.

Q. The second paragraph of your certificate gives you authority from Bluefield, West Virginia, to Virginia?

A. Yes.

Q. And the third paragraph gives it to you to another part of Virginia?

A. Yes.

Q. And they overlap?

A. Yes.

Q. And do you know whether you have been advised that, or Mr. Harrison has been advised, as to what you can do about shipments under this authority?

A. Yes.

Commissioner Hooker: How far is Beckley from Bluefield?

A. Fifty miles.

Q. Does not the certificate give you the authority for 75 miles?

A. Yes.

Mr. McInerny: But the second authority does not. He [fol. 60] can only use that authority once. To the extent they overlap, it can be used twice, but where there is no overlapping, he cannot use it but once; but they have two destinations in the second paragraph and only one state involved in the third paragraph.

Commissioner Hooker: In the second paragraph he can go from points and places within 75 miles of the terminal.

Commissioner Catterall: If he had another certificate that was word for word like that one, then he could say he could combine the two and go beyond and go both ways in the State of Virginia.

Mr. McInerny: If there was another authority, assuming there was an existing one.

Commissioner Catterall: Assuming the one he has now and he gets another one; if he had two, he could go in and back?

Mr. McInerny: Yes.

Commissioner Catterall: Even if those certificates were exactly the same?

Mr. McInerny: Yes. This certificate is a merger of two certificates that were at one time two outstanding certificates, and the predecessor carrier purchased the operation of another carrier. One had the operation one way, and the other had it the other way, and the Interstate Commerce Commission has held that, when that happens, they may be used in conjunction. I desire to brief the point on that.

Mr. Seibert: My feeling is that, as far as the position of the Interstate Commerce Commission is concerned, it has no effect on this Court in Virginia.

Commissioner Hooker: They only pass on interstate matters, and not intrastate matters.

By Mr. McInerny:

Q. One other thing I want to ask you. You indicated your average operating cost was 46 cents per mile. Does that relate to any particular type of equipment or particular operation?

A. That, of course, is the operation of the other than "over-the-road" trucks, the terminal-to-terminal operation.

Q. Is the terminal-to-terminal operation on a different

cost basis than this 46 cents relates to, that is, the peddler run or smaller vehicles?

[fol. 61] A. That is right.

Q. When you relate that 46 cents per mile to traffic, that would not be properly related to one shipment of 200 or 300 pounds?

A. No.

Q. Do you know what your average loading factor is for picking up traffic from Bluefield, West Virginia to Harrisville; are you familiar with that?

A. Equipment in that area runs fairly well loaded. We practically are loaded one way practically every time we go into that area, pretty well loaded. When you go, a lot of times, into these mines, you don't go loaded.

Q. With respect to your operations as a whole, does your company operate at a profit, or has it operated at a profit since you have been with it?

A. It has operated at a profit for the last two years.

Q. During the course of these interstate movements?

A. Yes.

Q. Are there many times when you are offered a single shipment of small size where you do actually run your operation where is (sic) would be conducted at a loss for a single movement? Mr. Seibert gave an example, from Danville to Rocky Mount. If you were required to handle a 500-pound shipment from Danville to Rocky Mount, Virginia through the Bluefield, West Virginia gateway and had no other traffic, would that result in a loss?

A. Certainly.

Q. Do you, as a matter of fact, experience some losses on some traffic, even when going direct?

A. Certainly.

Q. As a general matter, where you have small shipments, are they consolidated with other shipments to make a truckload?

A. That is the purpose of moving it into the terminal, in order to combine shipments and move them at a more profitable operation.

[fol. 62] Re-cross examination.

By Mr. Seibert:

Q. And what is your over-the-road cost?

A. The over-the-road cost is 42 cents.

Q. You said a moment back that you would not handle a shipment from Bluefield, West Virginia to Beckley, West Virginia, because it would be an intrastate shipment, yet you can carry a shipment from Bluefield to Tazewell because it would be an interstate run, according to your statement, between Bluefield and points and places within five miles in Virginia and points and places in West Virginia. What is the difference?

Commissioner Catterall: I am sorry I mentioned it!

A. We don't operate that way.

Commissioner Catterall: Counsel has explained it. He says he has two certificates. That is a hairline distinction. That is the real difference he distinguishes.

Commissioner Hooker: On this shipment from Danville to Rocky Mount, what route would you go on from Danville?

A. What route?

Q. Yes.

A. I don't think we ever have had any shipments to move out of Danville, but, if we did, we would try to handle it over the shortest route.

Q. Going through Martinsville over 220 to Roanoke?

A. We would not go to Roanoke, but to Bluefield.

Q. Isn't that the most direct route to Bluefield, 220 to Martinsville?

A. No, we would take 58 to Harrisville and then to Bluefield.

Q. You go through Martinsville either way. Do you know how close Martinsville is to Rocky Mount?

A. No, sir, I do not.

Q. About twenty miles is the distance.

Witness stood aside.

[fol. 63]

M. E. ROBINETTE, a witness introduced on behalf of Defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. McInerny:

Q. Will you please identify yourself by stating your full name, the name of the company with which you are associated, and the position you hold with that company.

A. M. E. Robinette; Bristol Steel & Iron Works, Bristol, Virginia; Traffic Manager.

Q. How long have you been associated with that Company in that capacity, sir?

A. Six and a half years.

Q. During that time, have you utilized the services of the Service Storage & Transfer Company of Bluefield, West Virginia?

A. Yes.

Q. On traffic moving from Bristol, Virginia to points in West Virginia and other points in Virginia?

A. Yes.

Q. Can you name some of those points in Virginia?

A. Grundy, Wise, and Carbo are the ones I can think of right off, but there are quite a few others.

Q. I hand you Delivery Receipt No. 45670 of Service Storage & Transfer Company indicating a shipment of two steel beams to Quesenberry Construction Company, Wise County Courthouse, at Wise, Virginia. Is that a shipment that moved from your plant to the Quesenberry Construction Company as shown as the destination thereof?

A. This moved out of our warehouse on Bryant Street in Bristol, Virginia.

Q. On the dates shown?

A. I would assume that would be true.

Q. Is that the traffic you have tendered to Service Storage & Transfer Company to that and other Virginia points in the past few years?

A. Yes.

Commissioner Hooker: Where was that going, to Wis Courthouse?

A. Yes.

[fol. 64] By Mr. McInerny:

Q. Are there other points in that general area, in what we call the "Southwest Virginia" area, to which your Company moves traffic via the Service Storage & Transfer Company?

A. Yes.

Q. And that has been done for a number of years?

A. Not for a number of years.

Q. For how long?

A. For 2½ to three years, around three years.

Q. Can you tell me approximately with what frequency you have used the service during that time?

A. I have no basis for frequency. You do not know how often you will get an order, but if you sell a piece of steel today to a man in Wise County, you don't know when you will sell another to that man again.

Commissioner Hooker: What is the name of your business?

A. Bristol Steel & Iron Works.

By Mr. McInerny:

Q. You would designated (sic) your movements as "spasmodic"?

A. Yes.

Q. Do you recall the time when you were advised by representatives of the Service Storage & Transfer Company that the service that they had previously rendered your company on traffic moving from Bristol had to be terminated?

A. That is particularly true of Carbo.

Q. You were so advised?

A. Yes.

Q. Do you recall the approximate date you received that advice?

A. Three weeks ago.

Q. And since that time has your Company utilized the services of Service Storage & Transfer Company, or have any services been rendered by the carrier to other Virginia points?

A. In certain instances they have a few that they pick up.

Q. When you were routing traffic via Service Storage & Transfer Company, were you advised that it was moved under interstate authority and under interstate tariffs?

A. Oh, yes.

Q. And did the traffic move at interstate rates?

A. Yes.

[fol. 65] Q. In addition to your own routing, have any of your consignees requested that the traffic be delivered by Service Storage & Transfer Company?

A. In our motor freight shipment the routing is done by our customers.

Q. And you follow the prescribed routing?

A. Everything else being equal, yes.

Q. Up till recent times, you had no complaints with respect to this type of service which has been rendered for 2½ to three years?

A. We have had no complaints.

Q. Can you describe generally the character of traffic, by size and weight? Would this be a representative shipment, one of relatively small size?

A. This is just the ordinary small-sized shipment. If there is any volume to a movement like this, this is two steel beams, I wish there were more information on it, but I imagine they would only weigh three hundred pounds, and that would be less than three feet long and not more than six inches thick, and if there were any volume at all, we would take it on our own trucks.

Commissioner Hooker: Is is (sic) just a short distance over there?

A. Yes.

Q. How far is it?

A. I have never been over there to Wise.

Q. I understood you to say it was a short distance.

A. Maybe there would be some other person that could answer that better than I could.

Q. You are doing the testifying. What do you understand "interstate authority" to mean?

A. My understanding of "interstate authority"?

Q. Yes, "interstate authority."

A. It is authority granted by the Interstate Commerce

Commission for the privilege of handling freight between states, under certain restrictions as given in the orders.

Q. That is a very good description.

Witness stood aside.

[fol. 66]

E. R. GRESHAM, JR. a witness introduced on behalf of Defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. McInerny:

Q. Will you please identify yourself by stating your full name, the name of the company with which you are associated, and the scope of your duties.

A. E. R. Gresham, Jr.; Parts Manager, Rish Equipment Company, Roanoke, Virginia.

Q. How long have you been associated with that Company?

A. At the time I went with the Company, it was Roanoke Truck & Engine Company. It was then changed to Rish Equipment Company, and as of March of this year it will be seventeen years.

Q. And what familiarity do you have with the traffic and transportation work of your Company? Do you have any connection with the carriers that perform transportation work for your Company?

A. Yes, I do.

Q. Are you familiar with the service performed by Service Storage & Transfer Company for your organization?

A. Yes.

Q. Have you utilized those services between your location at Roanoke to points they are authorized to serve in West Virginia?

A. I have.

Q. Have you also used their services to points they are authorized to serve in Southwest Virginia?

A. I have.

Q. For how long a period, to your knowledge, have those services been rendered for the account of your Company?

A. I could go several years back, some ten or twelve years.

Q. I ask you to look at Freight Bill No. 3253 of Service Storage & Transfer Company. Is that the type of traffic they have handled for your Company, the Service Storage & Transfer Company?

A. Yes, sir.

Q. When you route this traffic via Service Storage & Transfer Company, is it your intention that the traffic move [fol. 67] through Bluefield, West Virginia, as it must do under their authority?

A. If it is so requested by the customers, that they receive a shipment that they are urgently in need of, and they request that it be handled that way even though it is at a higher rate, as they are in need of it. If they want to be certain that they will get the shipment in time, and they order the shipment and receive the shipment with satisfactory service.

Q. This indicates that this particular shipment weighed 2480 pounds. Does your Company at any time have the necessity for a single movement of freight, several shipments in one vehicle destined to Southwest Virginia?

A. Recently, small shipments of that nature, we have not. The bulk of that is being handled through Bluefield, West Virginia.

Q. You have a distribution warehouse there?

A. Yes.

Q. Do you distribute any traffic from Roanoke to Southwest Virginia at this time?

A. The only thing would be in large quantities.

Q. Do you have any traffic from Roanoke to Bluefield, West Virginia?

A. Quite a bit.

Q. And on that traffic, do you utilize the service of Service Storage & Transfer Company?

A. Yes.

Q. Do you combine those shipments with other shipments moving down to Southwest Virginia?

A. If and when we have that type of business, but not generally.

Q. Can you indicate the size and weight of shipments that your Company tenders to the Service Storage & Transfer Company, giving the smallest size to the maximum?

A. It would range from anything over 100 pounds, and anything under that is handled generally now by way of a bus. Anything over 100 pounds on up to 700, 800, 1,000, or 10,000 pounds, whatever can be handled by them.

Q. Did anyone from Service Storage & Transfer Company recently inform you that they would be unable to handle some of your traffic from Roanoke, Virginia to other points in Virginia because of the pendency of this proceeding?

A. No.

[fol. 68] Q. Do you know whether any traffic of this type has moved from Roanoke to Glen Lyn, Virginia since November first for the account of your Company?

A. That is the only thing I know of.

Q. And this moved in August?

A. Yes.

Q. As far as you know, no traffic has moved to Southwest Virginia since November first?

A. That is correct.

Witness stood aside.

Commissioner Hooker: Have you any other testimony?

Mr. McInerny: No.

Commissioner Hooker: The Commission will take this matter under advisement.

Mr. McInerny: May counsel be permitted to submit a Brief as to its position?

Note: After conferring with Reporter as to time of delivery of transcript, which was promised by January 15, 1957, Commissioner Hooker informed Mr. McInerny that he could file his Brief within twenty days after receipt of the record, but stated that his Company would have to comply with the Commission's order.

Mr. McInerny: This is not an attempt to delay the matter, but we do desire to file the Brief, and we assure you that it is in good faith.

Commissioner Hooker: You have made a very poor effort at showing good faith, I can tell you that. As far as

I am concerned, it is over, unless your client is going to comply with the order of the Commission until we decide this case.

Mr. McInerny: I thought there might be some middle ground which we could agree to.

Commissioner Hooker: Are you going to file the Brief, or not? If you are, then your client must comply with the order of the Commission.

Chairman King: You may file the Brief twenty days after receipt of the record, but in the meantime, you have to comply with the Commission's order, and if you do not, that would be a violation of the Commission's Rule and order, and that would not be any question of interstate or intrastate traffic.

[fol. 69]

BEFORE THE STATE CORPORATION COMMISSION

Case No. 13182.

COMMONWEALTH OF VIRGINIA, at the relation of the STATE CORPORATION COMMISSION,

v.

SERVICE STORAGE & TRANSFER COMPANY, INCORPORATED.

JUDGMENT—February 26, 1957

On November 29, 1956, came on for hearing the rule issued against Service Storage & Transfer Company, Incorporated, for specified violations of Chapter 12, Title 56 of the Code of Virginia in transporting property for hire between points in Virginia in intrastate commerce without authority of the State Corporation Commission, Commissioners Hooker, King and Catterall sitting.

Francis W. McInerny and O. L. Shewmake appeared for the defendant. William C. Seibert appeared for the Commission.

The testimony shows and the defendant admits the transportation of property for compensation between the points in Virginia set forth in the rule.

From the following Virginia points of origin to the destinations shown, the only normal, regular or usual route is intrastate:

Origin	*Destination*
Bluefield, Virginia	Haysi, Virginia
Roanoke, Virginia	Glen Lyn, Virginia
Lynchburg, Virginia	Draper, Virginia
Roanoke, Virginia	Wytheville, Virginia
Bristol, Virginia	Carbo, Virginia
Bristol, Virginia	Cranes Nest, Virginia
Bristol, Virginia	Wise, Virginia
Lynchburg, Virginia	Marion, Virginia
Roanoke, Virginia	Kimbleton, Virginia
Roanoke, Virginia	Abingdon, Virginia

[fol. 70] and the Commission finds that the transportation of goods from the above named origin points to the above named destination points in the State of Virginia is in violation of Chapter 12, Title 56 of the Code of Virginia; and it appearing that by order in Case No. 13074 the defendant was fined $25.00 for the transportation of property intrastate over the same or similar routes, it is

Adjudged, Ordered and Decreed, That the defendant be fined $500.00 for each of the said violations, making a total of $5,000.00, together with the costs of this proceeding; and that a writ of *fieri facias* do issue in favor of the Commonwealth of Virginia against the defendant.

A True Copy.

Teste:

N. W. Atkinson, Clerk of the State Corporation Commission.

BEFORE THE STATE CORPORATION COMMISSION

March 21, 1957.

Case No. 13182.

COMMONWEALTH OF VIRGINIA, at the relation of the STATE CORPORATION COMMISSION,

v.

SERVICE STORAGE & TRANSFER COMPANY, INCORPORATED.

OPINION—March 21, 1957

Opinion, Catterall, Chairman:

This case is a prosecution of the defendant for operating as a common carrier by motor vehicle in intrastate commerce on the highways of Virginia without a certificate of public convenience and necessity in violation of §56-278 of the Code of Virginia. The defendant holds certificates of [fol. 71] public convenience and necessity issued by the Interstate Commerce Commission, but none from this Commission. There is no dispute as to the facts. The legal problem is where to draw the line between interstate and intrastate commerce. The defendant's I. C. C. certificates, of course, expressly limit the defendant's operations to interstate commerce. Notwithstanding the generality of the language in those certificates describing the geographical boundaries in which defendant may operate, the certificates contain a limiting clause to the effect that the holder of the certificate is granted authority:

"* * * to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle * * *"

Our inspectors discovered that the defendant was holding itself out as a common carrier to transport and was transporting property for compensation between numerous point (sic) in Virginia. Accordingly a rule was issued under §56-304.12 of the Code, which provides:

"The Commission may, by judgment entered after a hearing * * * if it be proved that the defendant * * * has violated any law of this State regulating the operation of motor vehicles for compensation on the highways of this State * * * impose a penalty, not exceeding one thousand dollars, which shall be collectible by the process of the Commission as provided by law."

Pursuant to the applicable provisions of the State Constitution the Commission, in cases of this kind, sits judicially as a court of record. The Commission fined the defendant $500 for each of ten specified violations of the law, making a total of $5,000 and costs; and issued a writ of *fieri facias*. Execution of the writ will be held in abeyance so long as defendant's petition for a writ of *supersedeas* is pending in the Supreme Court of Appeals.

The large size of the fine (one-half the maximum provided by law) is because in a prior case involving the same defendant, the same course of conduct and the same law, the Commission fined the defendant $25 for the purpose of settling the law of the case. The defendant paid the fine, did not take an appeal, and continued to operate in the same manner as before. Since $25 is all it costs to get a certificate of public convenience and necessity, it is manifest [fol. 72] that the fine will have to be adjusted upward until it has a deterrent effect.

The prior case was Case No. 13074. It was heard on June 28, 1956, and final judgment was entered on July 9, 1956. Our decision in that case is *res judicata* in this case. Pursuant to the authority conferred on it by §155 of the Constitution, the Commission has adopted the following rule:

"15. *Res Judicata.* The doctrine of *res judicata* applies to final judgments, orders and decrees entered by the Commission sitting as a court of record. It does not apply in cases in which the Commission has a duty of continuous supervision or in any case in which a matter is reserved for further consideration."

The final order in that case is as follows:

"COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

City of Richmond, July 9, 1956.

Case No. 13074.

COMMONWEALTH OF VIRGINIA, at the relation of the STATE CORPORATION COMMISSION,

v.

SERVICE STORAGE & TRANSFER COMPANY, INCORPORATED.

On June 28, 1956, came on for hearing the rule awarded against Service Storage & Transfer Company, Incorporated, alleging the transportation of property in intrastate commerce without authority of the State Corporation Commission, Commissioners Hooker, King and Catterall sitting.

[fol. 73] Francis W. McInerny appeared as counsel for the defendant. William C. Seibert appeared for the Commission.

It appearing to the Commission that from the evidence submitted the defendant did, as alleged in the rule of the Commission of June 11, 1956, transport property in intrastate commerce without the authority of the State Corporation Commission in violation of Chapter 12, Title 56 of the Code of Virginia, a fine of $25.00 and costs of the proceeding shall be assessed against the said defendant.

IT IS, THEREFORE, ORDERED:

(1) That Service Storage & Transfer Company, Incorporated, be, and it is hereby, fined the sum of $25.00 and costs of the proceeding.

(2) A copy of this order shall be sent to Francis W. McInerny, counsel for the defendant."

The Commission delivered the following opinion in that case:

"COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

July 9, 1956.

Case No. 13074.

COMMONWEALTH OF VIRGINIA, at the relation of the STATE CORPORATION COMMISSION

v.

SERVICE STORAGE & TRANSFER COMPANY, INCORPORATED

Opinion, Catterall, Commissioner:

This is a rule to show cause why the defendant should not be punished for operating intrastate in Virginia as a common carrier of property without a certificate of convenience and necessity from this Commission.

[fol. 74] The defendant admits the facts alleged in the rule. Its defense is that it can lawfully transport goods between Virginia points so long as it carries them out of the state and back again. It asserts, for example, the right to carry goods from Roanoke to Wytheville (which is 80 miles down Route 11), so long as it hauls them 160 miles around by Bluefield, Va.

Its federal certificate authorizes the defendant to engage in *interstate* commerce within 75 miles of Bluefield: the certificate specifies territory and not routes. If an I. C. C. certificate can and does grant the authority claimed by the defendant, the state commissions might as well go out of business.

The defendant relies on Atlantic Freight Lines, Inc., 51 M. C. C. 175 (1949) in which Division 5 of the Interstate Commerce Commission ruled that a movement from Pittsburgh to Philadelphia was interstate commerce if the movement goes by way of Baltimore.

Now there can be no doubt that a movement from a point in a state to another point in the same state is *sometimes* interstate commerce. The interesting question is whether the interstate character of the movement turns on whether

it *is* an interstate movement or whether the I. C. C. *says* it is an interstate movement. Division 5 favors the latter view. In *Eichholz* v. *Missouri P. S. C.*, 306 U. S. 268, the Supreme Court upheld the authority of a state commission. Division 5 explained that the Supreme Court was able to render that decision only because Division 5 had not spoken. It said (p. 190):

'Thus, the situation presented in that case is dissimilar in a very material respect from that here present. There the State acted while the carrier's application for authority was still pending before us and before we had decided the matter and assumed jurisdiction over the interstate movement. Here the application has been finally adjudicated and we have assumed jurisdiction. Accordingly, the *Eichholz* case is not authority for the proposition that the issue can be reopened and reviewed collaterally after we have finally determined the character of commerce to be interstate, have assumed jurisdiction, and have issued the certificate.'

If that declaration of the Interstate Commerce Commission is taken at its face value, that Commission could law-[fol. 75] fully make a binding adjudication that transportation between Richmond and Petersburg was interstate. Of course that declaration is to be read in its context, and the I. C. C. would presumably admit that it could not, by its mere say so, transmute intra into interstate commerce.

When the actual physical movement of the vehicle crosses the state line and back again the question of whether it thereby escapes state regulation depends on whether the movement was '*bona fide.*' Whether the movement was *bona fide* cannot be permitted to depend on the carrier's state of mind. The test must be whether an ordinarily prudent carrier not restrained by regulation would use that route. The defendant drives 160 miles from Roanoke to Wytheville not because that is a sensible way to go but because it crosses the line into West Virginia. No *unregulated* carrier would do such a thing. Our conclusion is that when a carrier follows a circuitous route for the purpose of escaping state regulation he does not escape it. And we judge his purpose not by what he says his purpose is, but by what it appears to be from looking at a highway map.

In *Eichholz* v. *Public Service Commission*, 306 U. S. 268, 83 L. ed. 641 (1939) the carrier hauled freight from St. Louis, Missouri, to Kansas City, Missouri, through his terminal in Kansas City, Kansas, which was located less than half a mile from the Missouri line. In holding that the state commission had jurisdiction, the court said (p. 274):

"Appellant insists that the hauling from St. Louis over the state line to Kansas City, Kansas, of merchandise consigned to persons in Kansas City, Missouri, and hauling it back again to its intended destination in Kansas City, Missouri, was actually interstate transportation * * * That fact, however, does not require the conclusion that the State's action for the protection of its intrastate commerce was invalid * * * We may assume that Congress could regulate interstate transportation of the sort here in question, whatever the motive of those engaging in it. But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected * * * If appellant's hauling of the merchandise in question across the state line was not in good faith but was a mere subterfuge to evade the State's requirement as to intrastate commerce, there is no ground [fol. 76] for saying that the prohibition of the use of the interstate permit to cover such transactions, and the application of the Commission's rule prohibiting them in the absence of an intrastate certificate, was an unwarrantable intrusion into the federal field or the subjection of interstate commerce to any unlawful restraint * * * *".

In *Central Greyhound Lines* v. *Mealey*, 334 U. S. 653, 92 L. ed. 1633 (1948), a carrier of passengers between termini in New York transported them over a route 42% of which was in other states. New York imposed a gross receipts tax on the total operation, and the New York Court of Appeals held that 'This is not interstate commerce.' The Supreme Court held that only 58% of the gross receipts could be taxed in New York. The court's opinion intimates that the *Eichholz* test is still valid, saying (p. 660):

"There is no suggestion here that the interstate routes were utilized as a means of avoiding even in part New York's taxation. Compare, e.g., *Eichholz* v. *Public Serv.*

Commission, 306 U. S. 268, 83 L. ed. 641, 59 S. Ct. 532, and *Ryan* v. *Pennsylvania Pub. Utility Commission*, 143 Pa. Super. 517, 17 A 2d 637. We are not dealing with a necessary deviation or a calculated detour."

The Motor Carrier Act of 1935 provides that a carrier seeking a grandfather certificate must prove that he 'was in *bona fide* operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made * * *' Thus the statute compels the courts to give meaning to the elusive phrase *'bona fide.'* In *Eastern Carrier Corporation* v. *United States*, 31 F. Supp. 232 (1939) the applicant, prior to 1935, transported property between termini in Pennsylvania. First it ran through Hackettstown, about 25 miles over in New Jersey, and then established a terminal at Bridgeville, New Jersey, about five miles from the border. The Interstate Commerce Commission decided that this was not *bona fide* interstate commerce. saying:

"The fact that a terminal has now been erected at Bridgeville and the routes have been shortened by using that as a transfer point instead of Hackettstown does not give the [fol. 77] color of genuineness to operations which, from their very inception, were fraudulent.'

The three-judge federal court agreed with the Commission, saying (p. 237):

"The Eichholz case appears to be nearly the converse of that at bar. The Supreme Court, by the Chief Justice, stated (306 U. S. at page 274, 59 S. Ct. at page 535, 83 L. Ed. 641): 'If appellant's hauling of the merchandise in question across the state line was not in good faith but was a mere subterfuge to evade the State's requirement as to intrastate commerce, there is no ground for saying that the prohibition of the use of the interstate permit to cover such transactions, and the application of the Commission's rule prohibiting them in the absence of an intrastate certificate, was an unwarrantable intrusion into the federal field or the subjection of interstate commerce to any unlawful restraint.' The language employed by the Supreme Court in the cited case, we think, casts illumination upon

the common sense interpretation which must be given to the phrase *'bona fide* operation' employed in the grandfather clause of the Motor Carrier Act."

Dohrn Transfer Co. v. *Hoegh,* 116 F. Supp. 177 (1953) was a suit before a three-judge court to enjoin state officials from enforcing Section 325.6 of the Code of Iowa as amended in 1953. The 1953 amendment provided:

"It is hereby declared unlawful for any motor carrier to transport over a regular route or between fixed termini any person or property, for compensation, from any point or place in the state of Iowa to another point or place in said state irrespective of the route, highway or highways traversed, *including the crossing of any state line of the state of Iowa,* or the ticket or bill of lading issued and used for such transportation, without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation." (Italics added.)

This statute is right in the teeth of 49 U. S. C. A. §303 (10) which provides:

"The term 'interstate commerce' means commerce between any place in a State and any place in another State *or between places in the same State through another State,* [fol. 78] whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water." (Italics added.)

The court refused to hold Section 325.6 void on its face, for the reason that it could be enforced to the extent permitted by the *Eichholz* test without conflicting with the federal statute. The court said (p. 189):

"In situations such as those disclosed in the case of *Eichholz* v. *Public Service Commission of Missouri,* 1939, 306 U. S. 268, 59 S. Ct. 532, 83 L. Ed. 641, the commerce clause would not be an impediment to the enforcement of the provisions of Section 325.6 as amended or to its applicability.

"It is not deemed necessary in the present case to make a declaration as to the constitutionality of Section 325.6 as amended. The plaintiff will be afforded adequate relief by treating the provisions of that Section as not applicable

to the plaintiff and enjoining the members of the Iowa Commerce Commission accordingly."

The court took a realistic and common sense view of both statutes. It did not take either the federal statute or the state statute literally. It construed boh (sic) of them in conformity with the rule laid down by the Supreme Court in *Eichholz,* namely, that a movement over a state line is subject to state jurisdiction if the movement is abnormal. The essence of the *Eichholz* rule is contained in the Supreme Court's quotation (at p. 271) of the District Court's finding that the carrier's route was not

'the normal, regular or usual route.'

There can seldom be doubt whether a route is normal, regular or usual.

In the *Dohrn Transfer Co.* case the routes followed by the carrier through Illinois between towns in Iowa were normal, regular and usual because bends in the Mississippi river made it normal, etc., to cross the river over and back. To illustrate this point the court gives a table of miles on page 180 of its opinion showing that the routes through Illinois were either the same as, shorter than or not more than three miles longer than the intrastate routes in Iowa.

We have no doubt that the shipments set forth in the rule to show cause were subject to regulation by Virginia within the rule laid down in the *Eichholz* case. That rule clearly [fol. 79] does not authorize the defendant to carry a parcel across the state line and then bring it back into Virginia over the same route. It would not be normal, regular or usual to transport goods from Roanoke to Bluefield, W. Va., and back to Salem or back to Pearisburg.

King, *Chairman* and Hooker, *Commissioner,* concur."

In applying the *Eichholz* rule there might be some situations in which reasonable men might differ as to whether a given route is "the normal, regular or usual route." Because of that possibility the following letters were exchanged between counsel for the carrier and commerce counsel:

"Washington 6. D. C.

July 12, 1956.

William C. Seibert, Esquire
Commerce Counsel
State Corporation Commission
Commonwealth of Virginia
Richmond, Virginia

"Dear Mr. Seibert:

"Yesterday I received from the Virginia State Corporation Commission its order holding that the operations complained of in case No. 13074 Commonwealth of Virginia *v.* Service Storage and Transfer Company, Inc., constitute operations in intrastate commerce in violation of certain provisions of the code of Virginia. I am reporting the results of this proceeding to officials of the company with recommendations and I expect to be advised on the company's intentions in respect to appeal or other action by July 20, 1956. In the circumstances, may I request that the effectiveness of the commission's order be delayed until August 1, 1956, so that the company may make determinations as to what future action, if any, should be taken.

"I desire to re-emphasize that it is the company's intention to comply with both the law of Virginia and the requirements of the Interstate Commerce Commission and the certificate which the carrier holds. As we advised your Commission during the course of the hearing on this matter, the [fol. 80] carrier is anxious to be informed with some degree of certainty as to what it may or may not do in transporting shipments between Virginia points through the gateway of Bluefield, West Virginia. The opinion of the Commission itself recognizes (Page 2, second paragraph) that 'transportation from points in a state to another point in the same state is *sometimes* interstate commerce.' The carrier's position on the matter is that it is entitled to know what standards or guides are to be used in determining when a particular movement constitutes interstate commerce and when it does not. In an effort to avoid protracted litigation on the question, we respectfully request your office to advise us informally as to what its judgment is on the matter. For as you can understand in the absence of an

authoritative guide or standard, the carrier would continue to subject itself to prosecutions and fines on the acceptance and transportation of any shipment moving from one Virginia point to another. The carrier and its officials are fully aware that the problem is one that has a 'twilight zone' and presents difficulty for your enforcement staff. It believes, however, that the continued attitude of cooperation between the carrier and your office may result in an appropriate solution to the problem.

Very truly yours,

FRANCIS W. McINERNY."

"COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

Richmond

July 13, 1956.

Francis W. McInerny, Esquire
1625 K Street, N. W.
Washington 6, D. C.

Dear Mr. McInerny:

"I have your letter of July 12, regarding the decision of this Commission in Case No. 13074 in which a fine of $25.00 and costs was assessed against the Service Storage & Transfer Company, Incorporated.

"A reasonable time is given for the payment of fines assessed by the Commission. We shall expect this fine to be paid in that time.

[fol. 81] "Concerning the statement in your letter that the carrier is entitled to know what standards or guides are to be used in determining when a particular movement constitutes interstate commerce and when it does not, I will advise you that it appears to me you have a choice of two courses. Under the Rules of Practice and Procedure of this Commission, and I am enclosing a pamphlet containing these rules, you may ask for a declaratory judgment. This is referred to under Rule 13 as shown in the pamphlet at-

tached. The alternative it appears to me, is to reach an agreement as to what might be considered interstate movement and what might be considered intrastate movement on shipments in the territory served by the Service Storage and Transfer Company, Incorporated. I believe, as I stated to you before, that we could reach some sort of an agreement as to what points we would consider as properly interstate and unless we received a complaint with respect to the movement we would allow our investigators to observe the same understanding. This agreement might be reached after a conference between us.

"I am sure you understand that it is our desire to cooperate with you and your client at all times. We are here to assist as well as to regulate.

Very truly yours,

WILLIAM C. SEIBERT
Commerce Counsel."

Thereafter our inspectors on the highways reported that the defendant had not changed its method of doing business; and the rule in the present case was issued. The rule came on for hearing on November 29, 1956, and the evidence and argument followed the same pattern as in the prior case. Counsel for the defendant asked leave to file a brief and leave was granted on the assumption that the defendant would abide by the law laid down in the prior case in the meantime.

The final judgment in this case was entered on February 26, 1957. The judgment describes ten routes that the carrier has served in intrastate commerce and fines the defendant $500 for each of ten violations.

[fol. 82] Counsel for the defendant makes the point that the interstate Commerce Commission has jurisdiction to interpret the meaning of its own certificates. We do not find in the record evidence that that Commission has interpreted the defendant's certificate to mean that it is authorized to do what we have punished it for doing. There are of course limits on the authority of a federal commission to interpret certificates issued by it. It could not, under

the guise of interpretation, enlarge the authority delegated to it by Congress or the power delegated to Congress by the Constitution.

Because of our federal form of government the present case is of great importance to the states. If the contentions so earnestly advanced by counsel for defendant are correct, it would follow that a carrier holding a federal certificate of convenience and necessity to operate over Route 1 between Baltimore and Richmond could do the following things: (1) It could pick up freight in Alexandria, take it to Washington and bring it to Richmond. (2) It could pick up freight in Richmond, take it to Washington and bring it back to Ashland.

If the defendant is right in saying that its certificates *permit* it to haul by circuitous routes between Virginia cities, it necessarily follows that its certificates *compel* it to perform those circuitous movements. A common carrier *must* render all the services that its certificate *authorizes* it to render.

In issuing certificates of convenience and necessity the regulatory bodies are required by the governing laws to issue no more certificates than are necessary to serve the public. State certificates cannot authorize a carrier to cross the state line. If federal certificates can authorize the movement of goods from Richmond to Ashland or Richmond to Petersburg the state regulatory pattern will be destroyed and the beneficent purposes of the state laws cannot be accomplished. Our conclusions are (1) The Constitution does not authorize Congress to regulate the transportation of a parcel consigned from Roanoke to Salem; (2) Congress has not authorized the I.C.C. to regulate the transportation of a parcel consigned from Roanoke to Salem; (3) the I.C.C. has not authorized the defendant to transport a parcel consigned from Roanoke to Salem. The defendant may transport freight from one Virginia city to another only when a normal, regular or usual route between the cities crosses the state line.

Hooker, Commissioner, concurs.

[fol. 83]

BEFORE THE STATE CORPORATION COMMISSION

[Title omitted]

ORDER RE ORIGINAL EXHIBITS—March 21, 1957

Service Storage & Transfer Company, Incorporated, by Jno. C. Goddin, of Counsel, having filed due notice of appeal in this case,

It Is Ordered that all of the original exhibits filed with the evidence, numbered and described as follows, be certified and forwarded to the Clerk of the Supreme Court of Appeals of Virginia, to be returned by the Clerk thereof to this Commission with the mandate of that Court:

Exhibit No.	*Description*
1.	Map of Virginia.
2.	Certificates of Public Convenience and Necessity, ICC, No. MC 30471, July 27, 1943, and No. MC 30471 SUB 1, July 6, 1950.
3.	Map, Delaware, Maryland, Virginia and West Virginia.
4.	Service Storage & Transfer Co., Inc. Operation, Nov. 28, 1956.
5.	Mileage between points in Virginia and West Virginia.
6.	Mileage between points in Virginia.
7.	Comparison of revenue, tonnage and shipments between two points in Virginia and of all shipments, week beginning June 18, 1956.
8.	Same as 7, week beginning Aug. 13, 1956.
9.	Roanoke outbound routing guide.

[fol. 84]

10.	Bristol outbound routing guide.
11.	Shipping Documents.

END

A True Copy.

Teste:

N. W. Atkinson, Clerk of the State Corporation Commission.

ACTING CHAIRMAN'S CERTIFICATE TO RECORD AND EXHIBITS (omitted in printing)

[fol. 85]

CLERK'S CERTIFICATE RE NOTICE OF APPEAL—March 22, 1957

I, N. W. Atkinson, Clerk of the State Corporation Commission, certify that within sixty days after the final order in this case Service Storage & Transfer Company, Incorporated, by Jno. C. Goddin, of Counsel, State-Planters Bank Building, Richmond 19, Virginia, filed with me a notice of appeal therein which had been delivered to Counsel for the State Corporation Commission and to the Attorney General of Virginia, there being no opposing counsel, pursuant to the provisions of Section 13 of Rule 5:1 of the Rules of Supreme Court of Appeals of Virginia.

Subscribed at Richmond, Virginia, March 22, 1957.

N. W. Atkinson, Clerk.

[fol. 89]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA

Record No. 4748

SERVICE STORAGE AND TRANSFER COMPANY, INCORPORATED, Appellant,

against

COMMONWEALTH OF VIRGINIA, Appellee.

Upon an appeal of right from an order entered by the State Corporation Commission on the 26th day of February, 1957.

JUDGMENT—March 10, 1958

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the order aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is error in part in the order appealed from. It is therefore adjudged and ordered that the said order be, and the same is hereby affirmed, except

in so far as the said order assesses fines for the transportation of goods originating in Roanoke, Lynchburg and Roanoke, Virginia, with respective destinations being Kimballton (Kimbleton), Marion and Abingdon, Virginia, and the cause is remanded to the said Corporation Commission with direction to amend its order with respect to the aforesaid three shipments in accordance with the views expressed in the said written opinion of this Court.

Which is ordered to be certified to the said Corporation Commission.

A Copy,

Teste: /s/ H. G. Turner, Clerk.

[fol. 90]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA

Record No. 4748

SERVICE STORAGE AND TRANSFER COMPANY, INC.,

v.

COMMONWEALTH OF VIRGINIA.

OPINION BY JUSTICE KENNON C. WHITTLE—March 10, 1958

FROM THE STATE CORPORATION COMMISSION OF VIRGINIA

This is an appeal of right from an order of the State Corporation Commission wherein Service Storage and Transfer Company, Inc. (hereinafter called Service) was fined $500 for each of ten alleged violations of Chapter 12, Title 56, Code of Virginia, 1950, the aggregate of the fines being $5,000.

The case grows out of a prosecution of Service under § 56-304.12 of the Code for allegedly operating as a common carrier in intrastate commerce on the highways of Virginia without a certificate of convenience and necessity in violation of § 56-278.

Service is a common carrier by motor vehicle, operating under authority of Certificate No. MC-30471, issued by the Interstate Commerce Commission. The territory covered in the certificate follows:

"Between Bluefield, Va., Bluefield, W. Va. and points and places within five miles of Bluefield, W. Va.

[fol. 91] [1] "Between Bluefield, Va., and points and places within five miles of Bluefield, Va., and those within five miles of Bluefield, W. Va., respectively, on the one hand, and, on the other, points and places in that part of Virginia and West Virginia within 75 miles of that territory.

[2] "Between Bluefield, W. Va., on the one hand, and, on the other, points and places in West Virginia, that part of Virginia west of U. S. Highway 29 and south of U. S. Highway 60 including points and places on the indicated portions of the highways specified, and that part of Virginia north of U. S. Highway 60 which is within 80 miles of Bluefield, W. Va."

The manifest object of the Interstate Commerce Comission's certificate was to permit Service to engage in interstate commerce. This is the extent of the commission's jurisdiction. Under the ICC certificate Service was empowered, (1) to gather freight within the defined territory and transport it out of Virginia into other jurisdictions; and (2) to gather freight within the defined territory, haul it out of the State and thence back to points within the defined territory, provided it acted in good faith and did not route the freight out of Virginia for the purpose of evading Virginia's jurisdiction. We are here concerned with the latter right.

It is contended by the Commonwealth that Service operates between points in Virginia by way of Bluefield, West Virginia; that the routes employed are not the usual or normal routes but are circuitous routes used for the purpose of evading the Virginia law; that Service was fined on July 9, 1956 for similar violations from which no appeal was taken; that since the imposition of that fine Service has continued to violate the rule issued by the

State Corporation Commission, resulting in the issuance of the present rule which is the basis for the fines involved on this appeal.

[fol. 92] A fine of $500 was imposed upon Service for goods shipped by alleged circuitous routes in each of the following instances:

Origin	*Destination*
Roanoke, Virginia	Glen Lyn, Virginia
Lynchburg, Virginia	Draper, Virginia
Roanoke, Virginia	Wytheville, Virginia
Bristol, Virginia	Carbo, Virginia
Bluefield, Virginia	Haysi, Virginia
Bristol, Virginia	Wise, Virginia
Roanoke, Virginia	Kimbleton [Kimballton), Va.
Bristol, Virginia	Cranes Nest, Virginia
Lynchburg, Virginia	Marion, Virginia
Roanoke, Virginia	Abingdon, Virginia

It was stipulated that each shipment went through Bluefield, West Virginia.

The Commonwealth established by uncontradicted evidence that Service did not follow the usual or normal route between the points involved. It was urged that the goods in question had been shipped by Service over unnecessarily long and circuitous routes for the sole reason that it did not hold a certificate of convenience and necessity from the State Corporation Commission of Virginia.

The several charges against Service were developed by the Commonwealth as follows:

[fol. 93] On August 21, 1956, an investigator of the Division of Motor Transportation of the State Corporation Commission stopped a truck owned by Service on Route 460, one mile north of Pearisburg, Virginia, on which was found a shipment from Rish Equipment Company, Roanoke, Virginia, to the Heron Todd Steel Construction Company, Inc., Glen Lyn, Virginia. This shipment had moved from Roanoke to Bluefield, West Virginia, and thence back to Glen Lyn, whereas the usual or normal route would have been direct from Roanoke to Glen Lyn, entirely within the State.

On August 22, 1956, an investigator stopped a truck owned by Service on Route 460, one mile north of Pearisburg, Virginia, where he found a shipment from Norfolk and Western Industries, Inc., Lynchburg, Virginia, to Sutphin and Jackson, Draper, Virginia. This shipment had moved from Lynchburg to Bluefield, West Virginia, and thence back to Draper, when the usual or normal route would have been from Lynchburg to Draper, wholly within the State.

On September 6, 1956, an investigator stopped a truck owned by Service on Route 460, one mile north of Pearisburg, Virginia, wherein he found a shipment from Leonard Electronics, Roanoke, Virginia, to Wytheville Vance Com- [fol. 94] pany, Wytheville, Virginia. This shipment moved from Roanoke through Bluefield, West Virginia, and thence back to Wytheville. The usual or normal route for this shipment would have been from Roanoke to Wytheville, wholly within the State.

On September 11, 1956, an investigator stopped a truck owned by Service on Route 58 near St. Paul, Virginia, on which he found a shipment from Bristol Steel and Iron Works, Bristol, Virginia, to Link Belt Company, Carbo, Virginia. This shipment moved from Bristol to Bluefield, West Virginia, and thence back to Carbo, when the usual or normal route would have been from Bristol to Carbo, wholly within the State.

On September 11, 1956, a truck owned by Service was stopped by an investigator on Highway 58, near St. Paul, Virginia. The truck contained a shipment from F. D. Lazenby and Company, Bluefield, Virginia, to Haysi Hardware Company, Haysi, Virginia. This shipment went from Bluefield, Virginia, to Bluefield, West Virginia, and thence back to Haysi, and did not take the usual or normal route which lies wholly within the State.

On September 13, 1956, another shipment was involved from Bristol Steel and Iron Works, Bristol, Virginia, to Quesenberry Construction Company, Wise, Virginia. This [fol. 95] shipment moved from Bristol to Bluefield, West Virginia, thence back to Wise, when the usual or normal route would have been from Bristol to Wise, wholly within the State.

On September 17, 1956, an investigator stopped a truck owned by Service at the junction of U. S. Highways 58 and 72, at Coeburn, Virginia, on which he found a shipment of iron railway car wheels from Enterprise Wheel and Car Corporation, Bristol, Virginia, to Banner Fuel Corporation, Cranes Nest, Virginia. This shipment moved from Bristol to Bluefield, West Virginia, thence back to Cranes Nest, when the usual or normal route would have been from Bristol to Cranes Nest, wholly within the State.

An examination of the maps of the State of Virginia, introduced as exhibits, showing the network of improved roads between the points here involved, conclusively shows that the routes used by Service in moving the various shipments were not the usual or normal routes. The commission was justified in finding, on this uncontradicted evidence, that Service had used these circuitous routes in an effort to bring the shipments within the purview of the [fol. 96] authority granted under its certificate from the Interstate Commerce Commission.

Service assigns six errors, the first four of which can be embodied in the question: Is the State Corporation Commission vested with the authority to regulate intrastate commerce in these instances and, if so, did it act within the grant of that authority in assessing the fines upon Service? Service thus contends that the action of the State Corporation Commission is beyond its jurisdiction. Section 56-278, Code of Virginia, 1950, reads:

"§ 56-278. Required Certificates of Public Convenience and Necessity.—No common carrier by motor vehicle or restricted common carrier by motor vehicle not herein exempted shall engage in intrastate operation on any highway within the State without first having obtained from the Commission a certificate of public convenience and necessity authorizing such operation, and a statement of the State Highway Commission that the law applicable to the proposed route or routes has been complied with as to size, weight, and type of vehicles to be used, and a like statement as to any increase in size, weight, and type of vehicles proposed to be operated by the applicant after such application is granted."

It is clear from the above section that the State Corporation Commission is vested with authority to issue certificates of public convenience and necessity in proper [fol. 97] instances where a common carrier by motor vehicle applies for same. The obvious purpose of the section is to give the Commission control over intrastate traffic on the highways of the Commonwealth. It is conceded that Service did not hold such a certificate.

The governmental regulation and supervision by a State of its internal commerce may lawfully be exerted through validly constituted administrative commissions or boards. *Pa. R.R. Co.* v. *Towers,* 245 U. S. 6, 62 L. ed. 117, 38 S. Ct. 2, L.R.A. 1918C 475.

A commission, if authorized by the law of the State, may make orders and regulations concerning intrastate commerce which do not conflict with the enactments of Congress, and its discretion in this respect may be exercised upon a view of all existing relevant facts and circumstances. *Ill. C.R.R. Co.* v. *De Fuentes,* 236 U. S. 157, 59 L. ed. 517, 35 S. Ct. 275.

It will be observed that the commerce here involved moved from points in Virginia through Bluefield, West Virginia, and then back to points in Virginia. Service argues in its brief that such movements constitute interstate commerce as defined by its ICC certificate. It says:

"The carrier (Service) also accepts for transportation shipments moving from one Virginia point within the [fol. 98] described territory to a second Virginia point within the described territory. This is done by using the two separate grants set forth above in combination (meaning paragraphs 1 and 2 in its ICC certificate heretofore quoted). It is as though two independent carriers were interchanging freight, one with the other, at Bluefield, West Virginia. To exemplify, upon receiving a request to transport a shipment from Lynchburg, Virginia, to Draper, Virginia, the carrier would pick up the shipment at Lynchburg under the authority contained in the first paragraph set forth above, and transport it to its terminal at Bluefield, West Virginia. Upon arrival at that point, the shipment would be transported to the Virginia destination

under the authority contained in the second paragraph set forth above."

Such a movement as suggested would be a mere subterfuge, and an attempt to divest the State Corporation Commission of its jurisdiction over intrastate commerce. 15 C.J.S., Commerce, § 24, pp. 289, 290, Footnote 18. Why ship goods from Lynchburg, Virginia, to Draper, Virginia, through Bluefield, West Virginia, when the obvious usual or normal route would be direct from Lynchburg to Draper, wholly within the State?

"Whether any transaction constitutes interstate or intrastate commerce depends on the essential character of what is done and the substantial surrounding circumstances." 15 C.J.S., Commerce, § 18, p. 278.

Of course, there are many instances in which shipments between points in the same State can properly be identified as interstate commerce, where the shipments follow the usual or normal routes between the points involved. That is not the case here. An examination of the evidence which includes the map exhibits of Virginia and West [fol. 99] Virginia clearly shows that the "normal or usual" routes were not followed between the Virginia points involved. On the contrary, the shipments were hauled miles out of the way, over circuitous routes, in order to accomplish the purpose sought.

The reasoning employed in *Eichholz* v. *Public Service Commission*, 306 U. S. 268, 83 L. ed. 641, 646, 59 S. Ct. 532, is applicable here. There it is said:

"Appellant insists that the hauling from St. Louis over the state line to Kansas City, Kansas, of merchandise consigned to persons in Kansas City, Missouri, and hauling it back again to its intended destination in Kansas City, Missouri, was actually interstate transportation. * * * That fact, however, does not require the conclusion that the State's action for the protection of its intrastate commerce was invalid. See Lone Star Gas Co. v. Texas, 304 U. S. 224, 238, 82 L. ed. 1304, 1314, 58 S. Ct. 883. We may assume that Congress could regulate interstate transportation of the sort here in question, whatever the motive of those engaging in it. But in the absence of the exercise of

federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected. * * * If appellant's hauling of the merchandise in question across the State line was not in good faith but was a mere subterfuge to evade the State's requirement as to intrastate commerce, there is no ground for saying that the prohibition of the use of the interstate permit to cover such transactions, and the application of the Commission's rule prohibiting them in the absence of an intra- [fol. 100] state certificate, was an unwarrantable intrusion into the federal field or the subjection of interstate commerce to any unlawful restraint. * * *'"

The reasoning employed in *Eastern Carrier Corp.* v. *U. S.*, 31 F. Supp. 232, 236, is also applicable:

"* * * Thus it may not be concluded that because a carrier transports merchandise across a state line in order to evade the orders of a state public service commission, it has thereby engaged in bona fide interstate commerce serving public convenience and necessity. Upon the contrary, the purpose which the carrier has served by such operation is a purely private purpose, the evasion of the laws of a state.

"The definition sought to be applied by the plaintiff for the phrase 'bona fide operation' is one which cannot be supported with any show of reason. This clearly appears from the authority which the plaintiff itself cites in Slagle Contract Carrier Application, 2 M.C.C. 127, 141, wherein the Commission said: '* * * The Latin words "bona fide" mean "in good faith." Webster's New International Dictionary defines "bona fide" as "in or with good faith; without fraud or deceit; real or really; actual or actually; genuine or genuinely." As defined in Black's Law Dictionary, the words mean "in or with good faith; honestly, openly, and sincerely; without deceit or fraud". '"

Under our dual system of government, the inherent sovereign power to regulate intrastate transportation by common carriers is reserved to the State, and within the [fol. 101] limitation of the State Constitution the authority

of the legislature is supreme in the regulation of intrastate transportation by common carriers unless such regulation in effect deprives a person of property without due process of law or materially burdens interstate commerce in violation of the Constitution of the United States. On the other hand, the power to regulate interstate and foreign commerce is, by provisions of the Federal Constitution, vested in Congress, and has been exercised by the enactment of the Interstate Commerce Act. 9 Am. Jur., Carriers, § 44, p. 453, and cases cited under Footnote 17.

The question for decision is whether the instant shipments involved intrastate or interstate commerce. Our conclusion is that under the facts and circumstances established they involve intrastate commerce and are thus amenable to the jurisdiction of State authority.

Service's next assignment of error challenges the right of the State Corporation Commission to assess fines against it in the absence of a rule to show cause alleging specific violations. This assignment is directed to three alleged shipments, originating at Roanoke, Lynchburg and Roanoke, Virginia; their respective destinations being Kimballton, Marion, and Abingdon, Virginia.

[fol. 102] The Attorney General concedes the lack of proper allegations and proof to justify the fines imposed in these three instances. This will require an amendment to the Commission's order, resulting in a reduction in the combined fines against Service from $5,000 to $3,500.

The final assignment of error reads: "The Commission erred in holding that its decision in a prior case is res adjudicata as to the issues involved in this proceeding."

In view of our disposition of the case on its merits it is not necessary to consider this assignment.

For the reasons stated the order of the State Corporation Commission is affirmed in part, reversed in part and remanded, with directions that the order be amended in accordance with the views here expressed.

Affirmed in part; reversed in part, and remanded.

[fol. 103] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 104]

SUPREME COURT OF THE UNITED STATES

No. 92, October Term, 1958

[Title omitted]

ORDER ALLOWING CERTIORARI—October 13, 1958

The petition herein for a writ of certiorari to the Supreme Court of Appeals of the Commonwealth of Virginia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Note

Page 99 is Exhibit 1,
a road map of Virginia.
It is not fully reproducible, and is being omitted
altogether in this set.

[fol. 106]

EXHIBIT 2

C-5.1*

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

NO. MC 30471*

SERVICE STORAGE & TRANSFER CO., INC., BLUEFIELD, WEST VIRGINIA

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D.C., on the 27th day of July, A.D., 1943.

AFTER DUE INVESTIGATION, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

IT IS ORDERED, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such iterms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

General commodities, except those of unusual value, and except dangerous explosives, household goods as

---

* This certificate also embraces the operating rights purchased by the above-named carrier from Arthur Goforth (H. T. Goforth, Administrator), doing business as Goforth Freight Lines, Docket No. MC 15815, pursuant to MC-F 1881, approved April 20, 1943.

defined in *Practices of Motor Common Carriers of Household Goods*, 17 M.C.C. 467, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading, over irregular routes,

Between Bluefield, Va., Bluefield, W. Va., and points and places within five miles of Bluefield, W. Va.

Between Bluefield, Va., and points and places within five miles of Bluefield, Va., and those within five miles of Bluefield, W. Va., respectively, on the one hand, and, on the other, points and places in that part of Virginia and West Virginia within 75 miles of that territory. Between Bluefield, W. Va., on the one hand, and, on the other, points and places in West Virginia, that part of Virginia west of U.S. Highway 29 and south of U.S. Highway 60 including points and places on the indicated portions of the highways specified, and that part of Virginia north of U.S. Highway 60 which is within 80 miles of Bluefield, W. Va.

IT IS FURTHER ORDERED, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

AND IT IS FURTHER ORDERED, That this certificate shall supersede the certificate issued to the above-named carrier in this proceeding on January 9, 1941, and that issued to the predecessor in interest under Docket No. MC 15815 on May 3, 1941, which are hereby canceled; the latter certificate having been duly transferred to the above-named carrier, as set forth in the footnote appended hereto.

By the Commission, division 5.

/s/ W. P. BARTEL

W. P. BARTEL,
Secretary

(Seal.)

[fol. 107]

C-15.1-R

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

NO. MC 30471 SUB 1*

SERVICE STORAGE & TRANSFER COMPANY, INC., BLUEFIELD, WEST VIRGINIA

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D.C., on the 6th day of July, A.D., 1950

AFTER DUE INVESTIGATION, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

IT IS ORDERED, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

General commodities, except those of unusual value, and except dangerous explosives, household goods as defined in *Practices of Motor Common Carriers of*

---

* This certificate embraces the remaining portion of the operating rights granted the above-named carrier in Certificate No. MC 30471 Sub 1, a portion thereof having been transferred pursuant to MC-FC 26729 (assigned No. MC 109329).

Household Goods, 17 M.C.C. 467, commodities in bulk, and those requiring special equipment, over irregular routes,

Between Bluefield, Va., and points and places in Virginia within five miles of Bluefield, and Bluefield, W. Va., and points and places in West Virginia within five miles of Bluefield, on the one hand, and, on the other, points and places in Pike, Letcher, and Harlan Counties, Ky.

AND IT IS FURTHER ORDERED, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revoation of this certificate.

By the Commission, division 5.

W. P. BARTEL,
Secretary.

(Seal)

[fol. 108]

EXHIBIT 4

SERVICE STORAGE AND TRANSFER COMPANY, INC.

OPERATION

November 28, 1956

Number of Employees—100

Equipment owned:

1 Company Sedan
1 Pickup Truck-Service Truck
20 Straight Trucks (2 open tops and 18 vans)
26 Tractors
52 Trailers (8 open tops, 44 vans)

100 Total

BREAKDOWN

Employees: Bluefield 82, Bristol 8, Roanoke 10.

Equipment: *Bluefield*

1 Company Sedan
1 Pickup Truck
2 Open top straight trucks
11 Van straight trucks
22 Tractors
8 Open top trailers
29 Van trailers

74 Total

Beckley

1 Open top straight truck
1 Van trailer

2 Total

Bristol

3 Van straight trucks
2 Tractors
4 Van trailers

9 Total

Charleston

4 Van trailers

4 Total

Roanoke

3 Van straight trucks
2 Tractors
6 Van trailers

11 Total

Total mileage for first ten months of 1956—1,349,280 Miles

[fol. 109] EXHIBIT 5

SERVICE STORAGE & TRANSFER CO., INC., BLUEFIELD, WEST VIRGINIA

MILEAGE BETWEEN POINTS IN VIRGINIA AND POINTS IN WEST VIRGINIA

		Miles Direct	Miles thru Bluefield, W. Va.
COVINGTON	—Beckley	98	156
LYNCHBURG	—LEWISBURG	119	243
ROANOKE	—WHITE SULPHUR SPRINGS	70	199
ROANOKE	—PRINCETON	98	122
LYNCHBURG	—WHITE SULPHUR SPRINGS	109	253
BRISTOL	—BERWIND	99	143
BRISTOL	—WELCH	116	135
BRISTOL	—LOGAN	169	198
MARION	—WELCH	71	109
COVINGTON	—HINTON	73	136

[fol. 110] EXHIBIT 6

SERVICE STORAGE & TRANSFER CO., INC., BLUEFIELD, WEST VIRGINIA

MILEAGE BETWEEN TWO POINTS IN VIRGINIA

		Miles Direct	Miles thru Bluefield, W. Va.
ROANOKE	—TAZEWELL	131	131
ROANOKE	—NARROWS	80	141
ROANOKE	—WYTHEVILLE	84	156
ROANOKE	—SALTVILLE	136	171
ROANOKE	—RICHLANDS	153	153
ROANOKE	—APPALACHIA	218	270
ROANOKE	—BRISTOL	154	206
ROANOKE	—COVINGTON	46	207
BRISTOL	—NORTON	70	262
BRISTOL	—RADFORD	120	142
BRISTOL	—WISE	75	267
BRISTOL	—COVINGTON	200	193
LYNCHBURG	—WYTHEVILLE	138	210

[fol. 111] EXHIBIT 7

SERVICE STORAGE & TRANSFER CO., INC., BLUEFIELD, WEST VIRGINIA

SHOWS TOTAL REVENUE, TONNAGE, AND NUMBER OF SHIPMENTS HANDLED BETWEEN TWO POINTS IN VIRGINIA IN COMPARISON TO TOTALS FROM ALL SHIPMENTS, DURING A ONE WEEK PERIOD BEGINNING JUNE 18, 1956 AND ENDING JUNE 23, 1956.

FROM ALL SHIPMENTS:

TOTAL REVENUE	$14,161.37
TOTAL TONNAGE	1,913,027 pounds
TOTAL NO. SHIPMENTS	2,605

FROM SHIPMENTS HANDLED BETWEEN TWO POINTS IN VIRGINIA:

TOTAL REVENUE	$500.95	3.5% OF ALL SHIPMENTS
TOTAL TONNAGE	36,213 pounds	1.9% OF ALL SHIPMENTS
TOTAL NO. SHIPMENTS	81	3.1% OF ALL SHIPMENTS

[fol. 112]

EXHIBIT 8

SERVICE STORAGE & TRANSFER CO., INC., BLUEFIELD, WEST VIRGINIA

SHOWS TOTAL REVENUE, TONNAGE, AND NUMBER OF SHIPMENTS HANDLED BETWEEN TWO POINTS IN VIRGINIA IN COMPARISON TO TOTALS FROM ALL SHIPMENTS DURING A ONE WEEK PERIOD BEGINNING AUGUST 13, 1956 AND ENDING AUGUST 18, 1956.

FROM ALL SHIPMENTS:

TOTAL REVENUE	$16,998.60
TOTAL TONNAGE	2,199,956 pounds
TOTAL SHIPMENTS	2,768

FROM SHIPMENTS HANDLED BETWEEN TWO POINTS IN VIRGINIA:

TOTAL REVENUE	$412.18	2.4% OF ALL SHIPMENTS
TOTAL TONNAGE	26,941	1.2% OF ALL SHIPMENTS
TOTAL NO. SHIPMENTS	67	2.4% OF ALL SHIPMENTS

[fol. 113] Clerk's certificate to foregoing exhibits (omitted in printing).

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FILED
JUN 9 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. [redacted] 92

SERVICE STORAGE AND TRANSFER CO., INC., *Petitioner*

vs.

COMMONWEALTH OF VIRGINIA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No.

SERVICE STORAGE AND TRANSFER CO., INC., *Petitioner*

vs.

COMMONWEALTH OF VIRGINIA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

Petitioner, Service Storage and Transfer Co., Inc., hereafter referred to as "Petitioner" or "Service," respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the Supreme Court of Appeals of Virginia, wherein the order of the State Corporation Commission was affirmed in part, reversed in part, and remanded.

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of Virginia is reported as *Service Storage and Transfer Co., Inc.* v. *Commonwealth of Virginia*, — Va. —, 102

S.E. 2nd 339, and is reproduced in full text as Appendix I to this Petition. The opinion of the State Corporation Commission of the Commonwealth of Virginia is printed in Record at pages 69 *et seq.* and is reproduced in full text as Appendix II to this Petition. The report of the Interstate Commerce Commission in *Service Storage and Transfer Co., Inc.— Petition for Declaratory Order* is reported in 71 M.C.C. 304 and is reproduced in full text as Appendix III to this Petition.

JURISDICTION

Petitioner seeks review of the decision of the Supreme Court of Appeals of Virginia dated March 10, 1958, and entered on the same date. Jurisdiction of this Court is invoked under Title 28, U.S.C., section 1257(3).

QUESTIONS PRESENTED

(1) Whether a state agency lawfully may impose criminal sanctions on a motor common carrier for conducting interstate operations in accordance with the carrier's interstate certificate of public convenience and necessity as construed by the Interstate Commerce Commission?

(2) Whether the enforcement of a state statute in a manner which requires discontinuance of motor carrier operations authorized by order of the Interstate Commerce Commission is in conflict with Part II of the Interstate Commerce Act and in contravention of the "Commerce clause" of Article I, Section 8 of the Federal Constitution.

(3) Whether a state agency which desires a certificated interstate motor carrier to discontinue allegedly unlawful operations must seek such relief from the

Interstate Commerce Commission as provided in Section 204(c) of Part II of the Interstate Commerce Act.

STATUTES INVOLVED

Interstate Commerce Act, Part II, Section 303(10); Title 49, U.S.C., Section 303(10).

> "The term "interstate commerce" means commerce between any place in a state and any place in another state or between places in the same state through another state, whether such commerce moves wholly by motor vehicle or partly by motor vehicle or partly by motor vehicle and partly by rail, express, or water."

Interstate Commerce Act, Part II, Section 204(c); *Title 49, U.S.C.,* Section 304(c):

> "Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provisions of this chapter or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of the opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint."

Title 56, Code of Virginia, Section 278; *Vol. 8,* page 235:

> "No common carrier by motor vehicle or restricted common carrier by motor vehicle not here-

in exempted shall engage in intrastate operation or any highway within a state without first having obtained from the Commission a certificate of public convenience and necessity authorizing such operation, and a statement of the State Highway Commission that the law applicable to the proposed route or routes has been complied with as to size, weight, and type of vehicles to be used, and a like statement as to any increase in size, weight, and type of vehicles proposed to be operated by the applicant after such application is granted."

Title 56, Code of Virginia, Section 304.12; *Vol. 8,* Cum. Supp.:

"The Commission may, by judgment entered after a hearing on notice duly served on the defendant not less than ten (10) days before the date of the hearing, if it be proved that the defendant made any misrepresentation of a material fact to obtain a warrant, exemption card or registration card, has made any improper use of any warrant, exemption card, registration card, classification plate, identification marker or identifying number, has violated any law of this state regulating the operation of motor vehicles for compensation on the highways of this state, has failed to make any report required by the Commission, has failed to pay any fee or tax properly assessed against him or has failed to comply with any lawful order, rule or regulation of the Commission, impose a penalty not exceeding One Thousand Dollars ($1,000.00), which shall be collectible by the process of the Commission as provided by law."

STATEMENT OF THE CASE

The Material Facts

The facts necessary to a complete and accurate understanding of the questions presented may be fully summarized as follows: Petitioner is the holder of a certificate of public convenience and necessity issued by the Interstate Commerce Commission. (R.-Ex. 2) That certificate authorizes and requires petitioner to transport property by motor vehicle from certain Virginia origin areas through Bluefield, West Virginia to certain Virginia destination areas. Other operations not material to the questions before the Court are also authorized. In accordance with the requirements of its operating authority, Petitioner for a number of years has accepted for transportation shipments moving from Virginia origins to Virginia destinations. (R. 38) All such shipments have been transported through Bluefield, West Virginia, with the knowledge and intent of the shipper. (R. 38-43) Petitioner's operations between Virginia points are in complete accord with a specific interpretation of petitioner's operating authority by the Interstate Commerce Commission. (Appendix III)

In September 1956 the State Corporation Commission instituted criminal proceedings against petitioner, wherein it was alleged that the transportation by petitioner of certain shipments between Virginia points constituted intrastate commerce and was therefore in violation of Virginia law. Petitioner defended on the ground that the questioned operations were interstate in character and were authorized by its interstate certificate as specifically construed by the Interstate Commerce Commission. The State Corporation Commission fined the carrier a total $5,000.00 ($500 on each of ten shipments found to have been trans-

ported in violation of Virginia law). On appeal the Supreme Court of Appeals of Virginia affirmed the order of the State Corporation Commission on seven of the alleged violations and reversed on the other three. This petition seeks review of the action of the Supreme Court of Appeals, to the extent it affirmed the order of the State Corporation Commission.

Petitioner's Contentions

(1) The Interstate Commerce Commission in *Atlantic Freight Lines, Inc.* 51 M.C.C. 175 has clearly stated petitioner's first principal contention:

> "... that primary jurisdiction to determine the bona fides of interstate transportation is vested in this Commission." 51 M.C.C. 186.

In support of that Conclusion the Commission referred to the opinion of the Superior Court of Pennsylvania in *Atlantic Freight Lines, Inc.* v. *Pennsylvania Public Utilities Commission,* 60 A. (2d) 589, wherein it was held:

> "* * * that the question of what is interstate commerce is one of fact; that since enactment of the Motor Carrier Act of 1935, the conclusive determination of that fact is vested in this Commission; that when this Commission has determined that certain transportation is bona fide interstate transportation, no state commission or court may thereafter collaterally attack such finding in another proceeding; but, where this Commission has not determined the question, the State Commission or court must use its best judgment in initially doing so." 51 M.C.C. 178.

(2) Petitioner's second contention was clearly stated in *Castle* v. *Hayes Freight Lines,* 348 U.S. 61, 63:

"Congress in the Motor Carrier Act adopted a comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce. The federal plan of control was so all-embracing that former power of states over interstate motor carriers was greatly reduced. No power at all was left in states to determine what carriers could or could not operate in interstate commerce. Exclusive power of the Federal Government to make this determination is shown by Section 306 of 49 U.S.C. which describes the conditions under which the Interstate Commerce Commission can issue certificates of convenience and necessity. And Section 312 of the same title provides that all certificates, permits or licenses issued by the Commission 'shall remain in effect until suspended or terminated as herein provided.' But in order to provide stability for operating rights of carriers, Congress placed within very narrow limits the Commission's power to suspend or revoke an outstanding certificate. No certificate is to be revoked, suspended or changed until after a hearing and a finding that a carrier has willfully failed to comply with the provisions of the Motor Carrier Act or with regulations properly promulgated under it. *Under these circumstances, it would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier's commission-granted right to operate. It cannot be doubted that suspension of this common carrier's right to use Illinois highways is the equivalent of a partial suspension of its federally granted certificate.*" (Emphasis added)

THE FEDERAL QUESTION WAS TIMELY AND PROPERLY RAISED

The Federal questions involved herein were raised in a timely manner and considered by both the State Corporation Commission and the Supreme Court of

Appeals of Virginia. Petitioner introduced its interstate certificate of public convenience and necessity before the State Corporation Commission, (R. 33), and asserted that the interstate operations alleged to be illegal were authorized by said certificate (R. 33 et. seq.). In its opinion the Corporation Commission considered the Federal question presented when it stated (R. 74):

> "Now there can be no doubt that a movement from a point in a state to another point in the same state is *sometimes* interstate commerce. The interesting question is whether the interstate character of the movement turns on whether it *is* an interstate movement or whether the I.C.C. *says* it is an interstate movement."

As a basis for its decision, the State Corporation Commission chose to apply its interpretation of *Eichholz* v. *Public Service Commission of Missouri*, 306 U.S. 268, 49 S. Ct. 532, 83 L. Ed. 641. The Commission referred to "The rule laid down by the Supreme Court in *Eichholz*, namely, that a movement over a state line is subject to state jurisdiction if the movement is abnormal" (R. 78).

That the State Corporation Commission considered the federal question raised is also made clear by the following statement contained in the opinion of the Commission:

> "Because of our federal form of government the present case is of great importance to the states. If the contentions so earnestly advanced by counsel for defendant are correct, it would follow that a carrier holding a federal certificate of convenience and necessity to operate over Route 1 between Baltimore and Richmond could do the following

things: (1) It could pick up freight in Alexandria, take it to Washington and bring it to Richmond. (2) It could pick up freight in Richmond, take it to Washington and bring it back to Asland.

If the defendant is right in saying that its certificates *permit* it to haul by circuitous routes between Virginia cities, it necessarily follows that its certificates *compel* it to perform those circuitous movements. A common carrier *must* render all the services that its certificate *authorizes* it to render." (Appendix 25(a))

Petitioner also presented the Federal issues involved to the Supreme Court of Appeals of Virginia. The following assignments of error were urged on brief to that Court:

"(1) The action of the Commission is beyond its jurisdiction."

"(2) The action of the Commission is in contravention of Section 203(10) of Part II of the Interstate Commerce Act and constitutes an unlawful collateral attack on an outstanding and valid order of the Interstate Commerce Commission."

"(3) The Interstate Commerce Commission has exclusive jurisdiction over the subject matter and any request for relief by the State Corporation Commission had to be addressed to the Federal Commission."

Since these assignments of error challenged the jurisdiction of the Virginia Courts they necessarily had to be considered by the Supreme Court of Appeals in affirming the judgment as to the fines imposed upon petitioner. In its opinion the Supreme Court of Appeals noted petitioner's argument that the move-

ments constituted interstate commerce. It then stated:

> "The question for decision is whether the instant shipments involved intrastate or interstate commerce. Our conclusion is that under the facts and circumstances established they involve intrastate commerce and are thus amenable to the jurisdiction of state authority." (Appendix I)

REASONS SUPPORTING THE GRANT OF THE WRIT

(a) Preliminary Statement

There is a clear and pressing need for this Court to express itself on the questions involved in this proceeding. As has been shown, the decision of the Virginia State Court of Appeals requires petitioner to pay $3,500 in fines for conducting its transportation business in accordance with a federal mandate. Petitioner is required to render service between authorized Virginia points to the shipping public as authorized by its interstate franchise as interpreted by the Interstate Commerce Commission or be subjected to certificate revocation proceedings under the Interstate Act. Petitioner is an innocent victim in a direct clash of governmental authority, one state and the other federal.

Petitioner contends that sound, consistent and authoritative administration of Part II of the Interstate Commerce Act, by the Interstate Commerce Commission requires this Court to grant certiorari so as to inform that Commission and the carriers subject to its jurisdiction whether interstate certificates may be given an interpretation by state authorities which conflict with those of the federal Commission. Petitioner further submits that the stability of the

national motor carrier industry intended by Congress when enacting federal regulation of the industry cannot be achieved nor maintained if certificated interstate motor carriers are to be required to serve two masters. The importance of the issue presented is indicated by the fact that litigation involving interstate motor carrier certificates has been frequently before the lower federal courts, the state courts and the Interstate Commerce Commission.

See, for example, *Roundtree* v. *Terrell*, 22 F. Supp. 297; *Andrew G. Nelson, Inc.* v. *Jessup*, 134 F. Supp. 221; *Atlantic Freight Lines, Inc.—Interpretation of Certificate*, 51 M.C.C. 175; *Atlantic Freight Lines, Inc.* v. *Pennsylvania P.U.C.*, 60 A. (2d) 589, 163 Pa. Super 215.

(b) The Supreme Court of Appeals of Virginia Has Decided a Federal Question of Substance Not Heretofore Determined By This Court

Petitioner knows of no decision of the Supreme Court of the United States in which the question raised by this petition has been specifically dealt with. A similar, if not the same issue, was presented in *Atlantic Freight Lines, Inc.* v. *Pennsylvania Public Utility Commission*, 336 U.S. 925 by petition for certiorari. This Court refused to grant the petition presumably on the ground that at the time the writ was requested the Interstate Commerce Commission had not given its interpretation of the authority contained in the certificate there in question. See *Atlantic Freight Lines, Inc.—Interpretation of Certificate*, 51 M.C.C. 175, 179, 186.

Although this Court has not decided the precise issue presented here, lower federal courts and the

Interstate Commerce Commission have been consistent in holding that interstate certificates of public convenience and necessity may be construed authoritatively only by the Interstate Commerce Commission and that such construction is binding on the state authorities. *Atlantic Freight Lines, Inc.—Interpretation of Certificate,* 51 M.C.C. 175, *Andrew G. Nelson, Inc.* v. *Jessup,* 134 F. Supp. 221, and *Roundtree* v. *Terrell,* 22 F. Supp. 297.

(c) The Supreme Court of Appeals of Virginia Has Decided a Substantial Federal Question Not In Accord With Applicable Decisions of This Court

As a motor carrier, certificated by the Interstate Commerce Commission to transport property in interstate commerce, Service Storage and Transfer Co., Inc. is obligated to render reasonably continuous and adequate service to the public to the full extent of the authority held. Indeed, Petitioner's certificate (Exhibit No. 2) specifically imposes such a requirement and the provisions of Section 212(a) of Part II of the Interstate Commerce Act subjects petitioner to the loss of its franchise for failure to provide the services authorized. It is because of this duty that Petitioner throughout this proceeding has resisted the interference of the state authorities, in spite of the fact that the traffic in question constitutes a relatively small portion of its business.

It is apparent that Service cannot conduct the operations required of it pursuant to the Interstate Commerce Act without violating the rule set forth in the decision from which review is now sought. Resolution of the dilemma created by the decision requires the action of this Court.

The State Corporation Commission has collaterally attacked the order of the federal Commission pursuant to which petitioner conducts interstate operations. That Commission has determined that the certificate held by Service does not authorize transportation between certain Virginia points. The State takes the position that it may determine with finality what constitutes "interstate commerce" and may force discontinuance of operations authorized by a certificate issued by the Interstate Commerce Commission.

In acting so as to impose criminal penalties upon Petitioner, the Commonwealth of Virginia has ignored both a federal statute and decisions of this Court which indicate that the forum having primary jurisdiction of the issues raised by the Virginia authorities is the Interstate Commerce Commission. Section 204(c) of Part II of the Interstate Commerce Act, *Title 49, U.S.C.*, Section 304(c), provides that "State boards" as well as other interested parties may resort to the Interstate Commerce Commission for relief in instances where authorized carriers are alleged to be operating beyond the scope of their interstate certificates. With reference to Section 204(c) this Court pointed out in *Castle* v. *Hayes Freight Lines*, 348 U.S. 61, 99 L. Ed. 68, 75 S. Ct. 151, that:

> "If therefore, motor carriers persistently and repeatedly violate the laws of a state, we know of no reason why the Commission may not protect the states interest either on the Commission's own initiative or on complaint of the state."

In *Andrew J. Nelson, Inc.* v. *Jessup*, 134 F. Supp. 221, 228, the United States District Court for the Southern District of Indiana observed in a factual

situation not greatly dissimilar from that presented here as follows:

> "The interpretation of a federal permit by state officers is contrary to the principle that '(t)he precise delineation of an enterprise which seeks the protection of the "grandfather" clause has been reserved for the Commission. Noble v. United States, 1942, 319 U.S. 88, 93, 63 S. Ct. 950, 952, 87 L. Ed. 1277. Circuit Judge Sanborn in Dart Transit Co. v. Interstate Commerce Commission, D.C. 1953, 110 F. Supp. 876, 880, stated: 'It is our opinion that in an action such as this, a court may not substitute its judgment for that of the Commission with respect to the question of the scope or coverage of a permit which the Commission has issued to a motor carrier, if that question is at all doubtful.' Also see, Pomprowitz v. United States, D.C. 1954, 119 F. Supp. 824. It seems reasonably deducible from this proposition that if the courts, in the exercise of judicial restraint, refuse to project themselves into the area granted exclusively to the Interstate Commerce Commission, except where the order is clearly wrong or arbitrary; United Truck Lines v. Interstate Commerce Commission, 9 Cir., 189 F. 2d 816, then certainly the construction of an interstate carrier's permit by state officials is untenable."

In addition Petitioner maintains that the decision of the Supreme Court of Appeals of Virginia in the instant case has misapplied and misinterpreted decisions of this Court and has failed to apply others. Both the State Corporation Commission and the Supreme Court of Appeals place reliance upon *Eichholz* v. *Public Service Commission of Missouri,* supra, which was taken to mean that any shipment is intrastate, even though it may pass through a sister

state, if it follows an "abnormal route." Petitioner is confident that this Court will immediately recognize that the Virginia Courts have misconstrued the doctrine applied in *Eichholz*. Unlike petitioner, Eichholz did not hold a certificate of public convenience and necessity from the Interstate Commerce Commission. The reason that this Court approved the Missouri Commission's assumption of jurisdiction in *Eichholz* was expressed with great clarity by Chief Justice Hughes' at 306 U.S. 273:

> "When the (Missouri) Commission revoked the permit, the Interstate Commerce Commission had not acted upon appellant's application under the Federal Motor Carrier Act and meanwhile the authority of the state body to take appropriate action under the state law to enforce reasonable regulations of traffic on the state highways had not been superseded." *H. P. Welch Company* v. *New Hampshire,* 306 U.S. 79, 83 L. Ed. 500, 59 S. Ct. 43.

Together the opinions of this court in both *Eichholz* and *Welch* reflect application of the principle that until the Federal government has acted, state governments have authority within limits to regulate interstate commerce under their police powers. Equally clear in the opinions, however, is the rule that when the Federal government has "occupied the field" the state governments are precluded from exercising jurisdiction.

In its haste and predisposition to conclude that the operations in question were intrastate in character the State of Virginia failed to recognize that state action of the type taken had been foreclosed by the exercise of the paramount powers of the federal

government. The Virginia authorities failed to give effect to the rule of decision applied by this court in *Bethlehem Steel Company* v. *New York Labor Relations Board,* 330 U.S. 767, 91 L. Ed. 1234, 67 S. Ct. 1026, and *Castle* v. *Hayes Freight Lines,* 348 U.S. 61, 99 L. Ed. 68, 75 S. Ct. 151. The governing principle was well stated in the *Bethlehem Steel Company* case, at page 773, as follows:

> "In other cases, Congress has passed statutes which initiate regulation of certain activities, but where effective regulation must wait upon the issuance of rules by an administrative body. In the interval before those rules are established, this court has usually held that the police power of the state may be exercised . . . *H. P. Welch Company* v. *New Hampshire* . . . but when Federal administration has made comprehensive regulation effectively governing the subject matter of the statute, the court has said that a state regulation in the field of the statute is invalid even though that particular phase of the subject has not been taken up by the Federal agency."

CONCLUSION

Section 203(10), *Part II, Interstate Commerce Act* (49 U.S.C. Section 303(10) defined interstate commerce as follows:

> "The term 'interstate commerce' means commerce between any place in a state and any place in another state or between places in the same state through another state, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water."

The State of Virginia has redefined that term as follows:

> "Commerce between places in the same state through another state when such commerce moves over a 'normal, regular, or usual route' between the points involved."

This Court should conclude that the action of the State of Virginia is in contravention of the Interstate Commerce Act and the "Commerce clause" of Constitution and grant certiorari.

Respectfully submitted,

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APPENDIX I

Present: All the Justices

OPINION BY JUSTICE KENNON C. WHITTLE

Richmond, Virginia, March 10, 1958

Record No. 4748

SERVICE STORAGE AND TRANSFER COMPANY, INC.

v.

COMMONWEALTH OF VIRGINIA

FROM THE STATE CORPORATION COMMISSION OF VIRGINIA

This is an appeal of right from an order of the State Corporation Commission wherein Service Storage and Transfer Company, Inc. (hereinafter called Service) was fined $500 for each of ten alleged violations of Chapter 12, Title 56, Code of Virginia, 1950, the aggregate of the fines being $5,000.

The case grows out of a prosecution of Service under § 56-304.12 of the Code for allegedly operating as a common carrier in intrastate commerce on the highways of Virginia without a certificate of convenience and necessity in violation of § 56-278.

Service is a common carrier by motor vehicle, operating under authority of Certificate No. MC-30471, issued by the Interstate Commerce Commission. The territory covered in the certificate follows:

"Between Bluefield, Va., Bluefield, W. Va. and points and places within five miles of Bluefield, W. Va.

(1) "Between Bluefield, Va., and points and places within five miles of Bluefield, Va., and those within five miles of Bluefield, W. Va., respectively, on the one hand, and, on the other, points and places in that part of Virginia and West Virginia within 75 miles of that territory.

(2) "Between Bluefield, W. Va., on the one hand, and, on the other, points and places in West Virginia, that part of Virginia west of U. S. Highway 29 and south of U. S. Highway 60 including points and places on the indicated portions of the highways specified, and that part of Virginia north of U. S. Highway 60 which is within 80 miles of Bluefield, W. Va."

The manifest object of the Interstate Commerce Commission's certificate was to permit Service to engage in interstate commerce. This is the extent of the commission's jurisdiction. Under the ICC certificate Service was empowered, (1) to gather freight within the defined territory and transport it out of Virginia into other jurisdictions; and (2) to gather freight within the defined territory, haul it out of the State and thence back to points within the defined territory, provided it acted in good faith and did not route the freight out of Virginia for the purpose of evading Virginia's jurisdiction. We are here concerned with the latter right.

It is contended by the Commonwealth that Service operates between points in Virginia by way of Bluefield, West Virginia; that the routes employed are not the usual or normal routes but are circuitous routes used for the purpose of evading the Virginia law; that Service was fined on July 9, 1956 for similar violations from which no appeal was taken; that since the imposition of that fine Service has continued to violate the rule issued by the State Corporation Commission, resulting in the issuance of the present rule which is the basis for the fines involved on this appeal.

A fine of $500 was imposed upon Service for goods shipped by alleged circuitous routes in each of the following instances:

Origin	*Destination*
Roanoke, Virginia	Glen Lyn, Virginia
Lynchburg, Virginia	Draper, Virginia
Roanoke, Virginia	Wytheville, Virginia
Bristol, Virginia	Carbo, Virginia
Bluefield, Virginia	Haysi, Virginia
Bristol, Virginia	Wise, Virginia
Roanoke, Virginia	Kimbleton (Kimballton), Va.
Bristol, Virginia	Cranes Nest, Virginia
Lynchburg, Virginia	Marion, Virginia
Roanoke, Virginia	Abingdon, Virginia

It was stipulated that each shipment went through Bluefield, West Virginia.

The Commonwealth established by uncontradicted evidence that Service did not follow the usual or normal route between the points involved. It was urged that the goods in question had been shipped by Service over unnecessarily long and circuitous routes for the sole reason that it did not hold a certificate of convenience and necessity from the State Corporation Commission of Virginia.

The several charges against Service were developed by the Commonwealth as follows:

On August 21, 1956, an investigator of the Division of Motor Transportation of the State Corporation Commission stopped a truck owned by Service on Route 460, one mile north of Pearisburg, Virginia, on which was found a shipment from Rish Equipment Company, Roanoke, Virginia, to the Heron Todd Steel Construction Company, Inc., Glen Lyn, Virginia. This shipment had moved from Roanoke to Bluefield, West Virginia, and thence back to Glen Lyn, whereas the usual or normal route would have been direct from Roanoke to Glen Lyn, entirely within the State.

On August 22, 1956, an investigator stopped a truck owned by Service on Route 460, one mile north Pearisburg, Virginia, where he found a shipment from Norfolk and Western Industries, Inc., Lynchburg, Virginia, to Sutphin

and Jackson, Draper, Virginia. This shipment had moved from Lynchburg to Bluefield, West Virginia, and thence back to Draper, when the usual or normal route would have been from Lynchburg to Draper, wholly within the State.

On September 6, 1956, an investigator stopped a truck owned by Service on Route 460, one mile north of Pearisburg, Virginia, wherein he found a shipment from Leonard Electronics, Roanoke, Virginia, to Wytheville Vance Company, Wytheville, Virginia. This shipment moved from Roanoke through Bluefield, West Virginia, and thence back to Wytheville. The usual or normal route for this shipment would have been from Roanoke to Wytheville, wholly within the State.

On September 11, 1956, an investigator stopped a truck owned by Service on Route 58 near St. Paul, Virginia, on which he found a shipment from Bristol Steel and Iron Works, Bristol, Virginia, to Link Belt Company, Carbo, Virginia. This shipment moved from Bristol to Bluefield, West Virginia, and thence back to Carbo, when the usual or normal route would have been from Bristol to Carbo, wholly within the State.

On September 11, 1956, a truck owned by Service was stopped by an investigator on Highway 58, near St. Paul, Virginia. The truck contained a shipment from F. D. Lazenby and Company, Bluefield, Virginia, to Haysi Hardware Company, Haysi, Virginia. This shipment went from Bluefield, Virginia to Bluefield, West Virginia, and thence back to Haysi, and did not take the usual or normal route which lies wholly within the State.

On September 13, 1956, another shipment was involved, from Bristol Steel and Iron Works, Bristol, Virginia, to Quesenberry Construction Company, Wise, Virginia. This shipment moved from Bristol to Bluefield, West Virginia, thence back to Wise, when the usual or normal route would have been from Bristol to Wise, wholly within the State.

On September 17, 1956, an investigator stopped a truck owned by Service at the junction of U. S. Highways 58 and 72, at Coeburn, Virginia, on which he found a shipment of iron railway car wheels from Enterprise Wheel and Car Corporation, Bristol, Virginia, to Banner Fuel Corporation, Cranes Nest, Virginia. This shipment moved from Bristol to Bluefield, West Virginia, thence back to Cranes Nest, when the usual or normal route would have been from Bristol to Cranes Nest, wholly within the State.

An examination of the maps of the State of Virginia, introduced as exhibits, showing the network of improved roads between the points here involved, conclusively shows that the routes used by Service in moving the various shipments were not the usual or normal routes. The commission was justified in finding, on this uncontradicted evidence, that Service had used these circuitous routes in an effort to bring the shipments within the purview of the authority granted under its certificate from the Interstate Commerce Commission.

Service assigns six errors, the first four of which can be embodied in the question: Is the State Corporation Commission vested with the authority to regulate intrastate commerce in these instances, and, if so, did it act within the grant of that authority in assessing the fines upon Service? Service thus contends that the action of the State Corporation Commission is beyond its jurisdiction. Section 56-278, Code of Virginia, 1950, reads:

> "§ 56-278. REQUIRED CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY.—No common carrier by motor vehicle or restricted common carrier by motor vehicle not herein exempted shall engage in intrastate operation on any highway within the State without first having obtained from the Commission a certificate of public convenience and necessity authorizing such operation, and a statement of the State Highway Commission that the law applicable to the proposed route or routes has been complied with as to size, weight,

and type of vehicles to be used, and a like statement as to any increase in size, weight, and type of vehicles proposed to be operated by the applicant after such application is granted."

It is clear from the above section that the State Corporation Commission is vested with authority to issue certificates of public convenience and necessity in proper instances where a common carrier by motor vehicle applies for same. The obvious purpose of the section is to give the Commission control over intrastate traffic on the highways of the Commonwealth. It is conceded that Service did not hold such a certificate.

The governmental regulation and supervision by a State of its internal commerce may lawfully be exerted through validly constituted administrative commissions or boards. *Pa. R.R. Co.* v. *Towers,* 245 U. S. 6, 62 L. ed. 117, 38 S. Ct. 2, L.R.A. 1918C 475.

A commission, if authorized by the law of the State, may make orders and regulations concerning intrastate commerce which do not conflict with the enactments of Congress, and its discretion in this respect may be exercised upon a view of all existing relevant facts and circumstances. *Ill. C. R.R. Co.* v. *De Fuentes,* 236 U. S. 157, 59 L. ed. 517, 35 S. Ct. 275.

It will be observed that the commerce here involved moved from points in Virginia through Bluefield, West Virginia, and then back to points in Virginia. Service argues in its brief that such movements constitute interstate commerce as defined by its ICC certificate. It says:

"The carrier (Service) also accepts for transportation shipments moving from one Virginia point within the described territory to a second Virginia point within the described territory. This is done by using the two separate grants set forth above in combination (meaning paragraphs 1 and 2 in its ICC certificate heretofore quoted). It is as though two independent

carriers were interchanging freight, one with the other, at Bluefield, West Virginia. To exemplify, upon receiving a request to transport a shipment from Lynchburg, Virginia, to Draper, Virginia, the carrier would pick up the shipment at Lynchburg under the authority contained in the first paragraph set forth above, and transport it to its terminal at Bluefield, West Virginia. Upon arrival at that point, the shipment would be transported to the Virginia destination under the authority contained in the second paragraph set forth above."

Such a movement as suggested would be a mere subterfuge, and an attempt to divest the State Corporation Commission of its jurisdiction over intrastate commerce. 15 C.J.S., Commerce, § 24, pp. 289, 290, Footnote 18. Why ship goods from Lynchburg, Virginia, to Draper, Virginia, through Bluefield, West Virginia, when the obvious usual or normal route would be direct from Lynchburg to Draper, wholly within the State?

> "Whether any transaction constitutes interstate or intrastate commerce depends on the essential character of what is done and the substantial surrounding circumstances." 15 C.J.S., Commerce, § 18, p. 278.

Of course, there are many instances in which shipments between points in the same State can properly be identified as interstate commerce, where the shipments follow the usual or normal routes between the points involved. That is not the case here. An examination of the evidence which includes the map exhibits of Virginia and West Virginia clearly shows that the "normal or usual" routes were not followed between the Virginia points involved. On the contrary, the shipments were hauled miles out of the way, over circuitous routes, in order to accomplish the purpose sought.

The reasoning employed in *Eichholz* v. *Public Service Commission*, 306 U. S. 268, 83 L. ed. 641, 646, 59 S. Ct. 532, is applicable here. There it is said:

"Appellant insists that the hauling from St. Louis over the state line to Kansas City, Kansas, of merhandise consigned to persons in Kansas City, Missouri, and hauling it back again to its intended destination in Kansas City, Missouri, was actually interstate transportation. * * * That fact, however, does not require the conclusion that the State's action for the protection of its intrastate commerce was invalid. See Lone Star Gas Co. v. Texas, 304 U. S. 244, 238, 82 L. ed. 1304, 1314, 58 S. Ct. 883. We may assume that Congress could regulate interstate transportation of the sort here in question, whatever the motive of those engaging in it. But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected. * * * If appellant's hauling of the merchandise in question across the State line was not in good faith but was a mere subterfuge to evade the State's requirement as to intrastate commerce, there is no ground for saying that the prohibition of the use of the interstate permit to cover such transactions, and the application of the Commission's rule prohibiting them in the absence of an intrastate certificate, was an unwarrantable intrusion into the federal field or the subjection of interstate commerce to any unlawful restraint. * * * ."

The reasoning employed in *Eastern Carrier Corp.* v. *U. S.*, 31 F. Supp. 232, 236, is also applicable:

"* * * Thus it may not be concluded that because a carrier transports merchandise across a state line in order to evade the orders of a state public service commission, it has thereby engaged in bona fide interstate commerce serving public convenience and necessity. Upon the contrary, the purpose which the carrier has served by such operation is a purely private purpose, the evasion of the laws of a state.

"The definition sought to be applied by the plaintiff for the phrase 'bona fide operation' is one which cannot be supported with any show of reason. This clearly appears from the authority which the plaintiff itself cites in Slagle Contract Carrier Application, 2 M.C.C. 127, 141, wherein the Commission said: ' * * * The

> Latin words "bona fide" mean "in good faith." Webster's New International Dictionary defines "bona fide" as "in or with good faith; without fraud or deceit; real or really; actual or actually; genuine or genuinely." As defined in Black's Law Dictionary, the words mean "in or with good faith; honestly, openly, and sincerely; without deceit or fraud".' "

Under our dual system of government, the inherent sovereign power to regulate intrastate transportation by common carriers is reserved to the State, and within the limitation of the State Constitution the authority of the legislature is supreme in the regulation of intrastate transportation by common carriers unless such regulation in effect deprives a person of property without due process of law or materially burdens interstate commerce in violation of the Constitution of the United States. On the other hand, the power to regulate interstate and foreign commerce is, by provisions of the Federal Constitution, vested in Congress, and has been exercised by the enactment of the Interstate Commerce Act. 9 Am. Jr., Carriers, § 44, p. 453, and cases cited under Footnote 17.

The question for decision is whether the instant shipments involved intrastate or interstate commerce. Our conclusion is that under the facts and circumstances established they involve intrastate commerce and are thus amenable to the jurisdiction of State authority.

Service's next assignment of error challenges the right of the State Corporation Commission to assess fines against it in the absence of a rule to show cause alleging specific violations. This assignment is directed to three alleged shipments, originating at Roanoke, Lynchburg and Roanoke, Virginia; their respective destinations being Kimballton, Marion, and Abingdon, Virginia.

The Attorney General concedes the lack of proper allegations and proof to justify the finest imposed in these three instances. This will require an amendment to the Commis-

sion's order, resulting in a reduction in the combined fines against Service from $5,000 to $3,500.

The final assignment of error reads: "The Commission erred in holding that its decision in a prior case is res adjudicata as to the issues involved in this proceeding."

In view of our disposition of the case on its merits it is not necessary to consider this assignment.

For the reasons stated the order of the State Corporation Commission is affirmed in part, reversed in part and remanded, with directions that the order be amended in accordance with the views here expressed.

Affirmed in part;
reversed in part,
and remanded.

APPENDIX II

page 135 } COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

RICHMOND

City of Richmond, February 26, 1957.

Case No. 13182.

COMMONWEALTH OF VIRGINIA, at the relation of the STATE CORPORATION COMMISSION

v.

SERVICE STORAGE & TRANSFER COMPANY, INCORPORATED

On November 29, 1956, came on for hearing the rule issued against Service Storage & Transfer Company, Incorporated, for specified violations of Chapter 12, Title 56

of the Code of Virginia in transporting property for hire between points in Virginia in intrastate commerce without authority of the State Corporation Commission, Commissioners Hooker, King and Catterall sitting.

Francis W. McInerny and O. L. Shewmake appeared for the defendant. William C. Seibert appeared for the Commission.

The testimony shows and the defendant admits the transportation of property for compensation between the points in Virginia set forth in the rule.

From the following Virginia points of origin to the destinations shown, the only normal, regular or usual route is intrastate:

Origin	*Destination*
Bluefield, Virginia	Haysi, Virginia
Roanoke, Virginia	Glen Lyn, Virginia
Lynchburg, Virginia	Draper, Virginia
Roanoke, Virginia	Wytheville, Virginia
Bristol, Virginia	Carbo, Virginia
Bristol, Virginia	Cranes Nest, Virginia
Bristol, Virginia	Wise, Virginia
Lynchburg, Virginia	Marion, Virginia
Roanoke, Virginia	Kimbleton, Virginia
Roanoke, Virginia	Abingdon, Virginia

and the Commission finds that the transportation of goods from the above named origin points to the above named destination points in the State of Virginia is in violation of Chapter 12, Title 56 of the Code of Virginia; and it appearing that by order in Case No. 13074 the defendant was fined $25.00 for the transportation of property intrastate over the same or similar routes, it is

page 136 } ADJUDGED, ORDERED AND DECREED, That the defendant be fined $500.00 for each of the said violations, making a total of $5,000.00, together with the

costs of this proceeding; and that a writ of *fieri facias* do issue in favor of the Commonwealth of Virginia against the defendant.

A True Copy.

Teste:

N. W. ATKINSON
Clerk of the State Corporation Commission.

page 137 } COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

March 21, 1957.

Case No. 13182.

COMMONWEALTH OF VIRGINIA, at the relation of the STATE CORPORATION COMMISSION

v.

SERVICE STORAGE & TRANSFER COMPANY, INCORPORATED

Opinion, Catterall, *Chairman.*

This case is a prosecution of the defendant for operating as a common carrier by motor vehicle in intrastate commerce on the highways of Virginia without a certificate of public convenience and necessity in violation of § 56-278 of the Code of Virginia. The defendant holds certificates of public convenience and necessity issued by the Interstate Commerce Commission, but none from this Commission. There is no dispute as to the facts. The legal problem is where to draw the line between interstate and intrastate commerce. The defendant's I. C. C. certificates, of course, expressly limit the defendant's operations to interstate commerce. Notwithstanding the generality of the language in those certificates describing the geographical boundaries in which defendant may operate, the cer-

tificates contain a limiting clause to the effect that the holder of the certificate is granted authority:

"* * * to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle * * *"

page 138 } Our inspectors discovered that the defendant was holding itself out as a common carrier to transport and was transporting property for compensation between numerous points in Virginia. Accordingly a rule was issued under § 56-304.12 of the Code, which provides:

"The Commission may, by judgment entered after a hearing * * * if it be proved that the defendant * * * has violated any law of this State regulating the operation of motor vehicles for compensation on the highways of this State * * * impose a penalty, not exceeding one thousand dollars, which shall be collectible by the process of the Commission as provided by law."

Pursuant to the applicable provisions of the State Constitution the Commission, in cases of this kind, sits judicially as a court of record. The Commission fined the defendant $500 for each of ten specified violations of the law, making a total of $5,000 and costs; and issued a writ of *fieri facias*. Execution of the writ will be held in abeyance so long as defendant's petition for a writ of *supersedeas* is pending in the Supreme Court of Appeals.

The large size of the fine (one-half the maximum provided by law) is because in a prior case involving the same defendant, the same course of conduct and the same law, the Commission fined the defendant $25 for the purpose of settling the law of the case. The defendant paid the fine, did not take an appeal, and continued to operate in the same manner as before. Since $25 is all it costs to get a certificate of public convenience and necessity, it is manifest that the fine will have to be adjusted up-

page 139 } ward until it has a deterrent effect.

The prior case was Case No. 13074. It was

heard on June 28, 1956, and final judgment was entered on July 9, 1956. Our decision in that case is *res judicata* in this case. Pursuant to the authority conferred on it by § 155 of the Constitution, the Commission has adopted the following rule:

"15. *Res Judicata.* The doctrine of *res judicata* applies to final judgments, orders and decrees entered by the Commission sitting as a court of record. It does not apply in cases in which the Commission has a duty of continuous supervision or in any case in which a matter is reserved for further consideration."

The final order in that case is as follows:

"COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

City of Richmond, July 9, 1956.

Case No. 13074.

COMMONWEALTH OF VIRGINIA, at the relation of the STATE CORPORATION COMMISSION

v.

SERVICE STORAGE & TRANSFER COMPANY, INCORPORATED

On June 28, 1956, came on for hearing the rule awarded against Service Storage & Transfer Company, Incorporated, alleging the transportation of property in intrastate commerce without authority of the State Corporation Commission, Commissioners Hooker, King and Catterall sitting.

Francis W. McInerny appeared as counsel for the defendant. William C. Seibert appeared for the Commission.

It appearing to the Commission that from the evidence submitted the defendant did, as alleged in the rule of the Commission of June 11, 1956, transport prop-
page 140 } erty in intrastate commerce without the authority of the State Corporation Commission in vio-

lation of Chapter 12, Title 56 of the Code of Virginia, a fine of $25.00 and costs of the proceeding shall be assessed against the said defendant.

IT IS, THEREFORE, ORDERED:

(1) That Service Storage & Transfer Company, Incorporated, be, and it is hereby, fined the sum of $25.00 and costs of the proceeding.

(2) A copy of this order shall be sent to Francis W. McInerny, counsel for the defendant."

The Commission delivered the following opinion in that case:

"COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

July 9, 1956.

Case No. 13074.

COMMONWEALTH OF VIRGINIA, at the relation of the STATE CORPORATION COMMISSION

v.

SERVICE STORAGE & TRANSFER COMPANY, INCORPORATED

Opinion, Catterall, *Commissioner.*

This is a rule to show cause why the defendant should not be punished for operating intrastate in Virginia as a common carrier of property without a certificate of convenience and necessity from this Commission.

The defendant admits the facts alleged in the rule. Its defense is that it can lawfully transport goods between Virginia points so long as it carries them out of the state and back again. It asserts, for example, the right to carry goods from Roanoke to Wytheville (which is 80 miles down Route 11), so long as it hauls them 160 miles around by Bluefield, W. Va.

page 141

Its federal certificate authorizes the defendant to engage in *interstate* commerce within 75 miles of Bluefield: the certificate specifies territory and not routes. If an I. C. C. certificate can and does grant the authority claimed by the defendant, the state commissions might as well go out of business.

The defendant relies on Atlantic Freight Lines, Inc., 51 M.C.C. 175 (1949) in which Division 5 of the Interstate Commerce Commission ruled that a movement from Pittsburgh to Philadelphia was interstate commerce if the movement goes by way of Baltimore.

Now there can be no doubt that a movement from a point in a state to another point in the same state is *sometimes* interstate commerce. The interesting question is whether the interstate character of the movement turns on whether it *is* an interstate movement or whether the I. C. C. *says* it is an interstate movement. Division 5 favors the latter view. In *Eichholz* v. *Missouri P. S. C.*, 306 U. S. 268, the Supreme Court upheld the authority of a state commission. Division 5 explained that the Supreme Court was able to render that decision only because Division 5 had not spoken. It said (p. 190):

'Thus, the situation presented in that case is dissimilar in a very material respect from that here present. There the State acted while the carrier's application for authority was still pending before us and before we had decided the matter and assumed jurisdiction over the inter-
page 142 } state movement. Here the application has been finally adjudicated and we have assumed jurisdiction. Accordingly, the *Eichholz* case is not authority for the proposition that the issue can be reopened and reviewed collaterally after we have finally determined the character of commerce to be interstate, have assumed jurisdiction, and have issued the certificate.'

If that declaration of the Interstate Commerce Commission is taken at its face value, that Commission could law-

fully make a binding adjudication that transportation between Richmond and Petersburg was interstate. Of course that declaration is to be read in its context, and the I. C. C. would presumably admit that it could not, by its mere say so, transmute intra into interstate commerce.

When the actual physical movement of the vehicle crosses the state line and back again the question of whether it thereby escapes state regulation depends on whether the movement was *'bona fide.'* Whether the movement was *bona fide* cannot be permitted to depend on the carrier's state of mind. The test must be whether an ordinarily prudent carrier not restrained by regulation would use that route. The defendant drives 160 miles from Roanoke to Wytheville not because that is a sensible way to go but because it crosses the line into West Virginia. No *unregulated* carrier would do such a thing. Our conclusion is that when a carrier follows a circuitous route for the purpose of escaping state regulation he does not escape it. And we judge his purpose not by what he says his purpose is, but by what it appears to be from looking at a highway map.

page 143 } In *Eicholz* v. *Public Service Commission*, 306 U. S. 268, 83 L. ed. 641 (1939) the carrier hauled freight from St. Louis, Missouri, to Kansas City, Missouri, through his terminal in Kansas City, Kansas, which was located less than half a mile from the Missouri line. In holding that the state commission had jurisdiction, the court said (p. 274):

"Appellant insists that the hauling from St. Louis over the state line to Kansas City, Kansas, of merchandise consigned to persons in Kansas City, Missouri, and hauling it back again to its intended destination in Kansas City, Missouri, was actually interstate transportation * * * That fact, however, does not require the conclusion that the State's action for the protection of its intrastate commerce was invalid * * *. We may assume that Congress

could regulate interstate transportation of the sort here in question, whatever the motive of those engaging in it. But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected * * * If appellant's hauling of the merchandise in question across the state line was not in good faith but was a mere subterfuge to evade the State's requirement as to intrastate commerce, there is no ground for saying that the prohibition of the use of the interstate permit to cover such transactions, and the application of the Commission's rule prohibiting them in the absence of an intrastate certificate, was an unwarrantable intrusion into the federal field or the subjection of interstate commerce to any unlawful restraint * * *"

In *Central Greyhound Lines* v. *Mealey*, 334 U. S. 653, 92 L. ed. 1633 (1948), a carrier of passengers between termini in New York transported them over a route 42% of which was in other states. New York imposed a gross receipts tax on the total operation, and the New York Court of Appeals held that 'This is not interstate commerce.' The Supreme Court held that only 58% of the gross
page 144 receipts could be taxed in New York. The court's opinion intimates that the *Eichholz* test is still valid, saying (p. 660):

"There is no suggestion here that the interstate routes were utilized as a means of avoiding even in part New York's taxation. Compare, e. g., *Eichholz* v. *Public Serv. Commission*, 306 U. S. 268, 83 L. ed. 641, 59 S. Ct. 532; and *Ryan* v. *Pennsylvania Pub. Utility Commission*, 143 Pa. Super 517, 17 A 2d 637. We are not dealing with a necessary deviation or a calculated detour."

The Motor Carrier Act of 1935 provides that a carrier seeking a grandfather certificate must prove that he 'was in *bona fide* operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the ter-

ritory for which application is made * * *' Thus the statute compels the courts to give meaning to the elusive phrase '*bona fide.*' In *Eastern Carrier Corporation* v. *United States,* 31 F. Supp. 232 (1939) the applicant, prior to 1935, transported property between termini in Pennsylvania. First it ran through Hackettstown, about 25 miles over in New Jersey, and then established a terminal at Bridgeville, New Jersey, about five miles from the border. The Interstate Commerce Commission decided that this was not *bona fide* interstate commerce, saying:

"The fact that a terminal has now been erected at Bridgeville, and the routes have been shortened by using that as a transfer point instead of Hackettstown does not give the color of genuineness to operations which, from their very inception, were fraudulent.'

The three-judge federal court agreed with the Commission, saying (p. 237):

page 145 } "The Eichholz case appears to be nearly the converse of that at bar. The Supreme Court, by the Chief Justice, stated (306 U. S. at page 274, 59 S. Ct. at page 535, 83 L. Ed. 641): 'If appellant's hauling of the merchandise in question across the state line was not in good faith but was a mere subterfuge to evade the State's requirement as to intrastate commerce, there is no ground for saying that the prohibition of the use of the interstate permit to cover such transactions, and the application of the Commission's rule prohibiting them in the absence of an intrastate certificate, was an unwarrantable intrusion into the federal field or the subjection of interstate commerce to any unlawful restraint.' The language employed by the Supreme Court in the cited case, we think, casts illumination upon the common sense interpretation which must be given to the phrase '*bona fide* operation' employed in the grandfather clause of the Motor Carrier Act."

Dohrn Transfer Co. v. *Hoegh,* 116 F. Supp. 177 (1953) was a suit before a three-judge court to enjoin state officials

from enforcing Section 325.6 of the Code of Iowa as amended in 1953. The 1953 amendment provided:

"It is hereby declared unlawful for any motor carrier to transport over a regular route or between fixed termini any person or property, for compensation, from any point or place in the state of Iowa to another point or place in said state irrespective of the route, highway or highways traversed, *including the crossing of any state line of the state of Iowa,* or the ticket or bill of lading issued and used for such transportation, without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation." (Italics added).

This statute is right in the teeth of 49 U. S. C. A. §303 (10), which provides:

"The term 'interstate commerce' means commerce between any place in a State and any place in another State *or between places in the same State through another State,* whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water." (Italics added).

page 146 } The court refused to hold Section 325.6 void on its face, for the reason that it could be enforced to the extent permitted by the *Eichholz* test without conflicting with the federal statute. The court said (p. 189):

"In situations such as those disclosed in the case of *Eichholz* v. *Public Service Commission of Missouri,* 1939, 306 U. S. 268, 59 S. Ct. 532, 83 L. Ed. 641, the commerce clause would not be an impediment to the enforcement of the provisions of Section 325.6 as amended or to its applicability.

"It is not deemed necessary in the present case to make a declaration as to the constitutionality of Section 325.6 as amended. The plaintiff will be afforded adequate relief by treating the provisions of that Section as not applicable to

the plaintiff and enjoining the members of the Iowa Commerce Commission accordingly."

The court took a realistic and common sense view of both statutes. It did not take either the federal statute or the state statute literally. It construed both of them in conformity with the rule laid down by the Supreme Court in *Eichholz,* namely, that a movement over a state line is subject to state jurisdiction if the movement is abnormal. The essence of the *Eichholz* rule is contained in the Supreme Court's quotation (at p. 271) of the District Court's finding that the carrier's route was not

'the normal, regular or usual route.'

There can seldom be doubt whether a route is normal, regular or usual.

In the *Dohrn Transfer Co.* case the routes followed by the carrier through Illinois between towns in Iowa were normal, regular and usual because bends in the Mississippi river made it normal, etc., to cross the river over and back. To illustrate this point the court gives a table of miles on page 180 of its opinion showing that the routes through Illinois were either the same as, shorter than or not more than three miles longer than the intrastate routes in Iowa.

page 147

We have no doubt that the shipments set forth in the rule to show cause were subject to regulation by Virginia within the rule laid down in the *Eichholz* case. That rule clearly does not authorize the defendant to carry a parcel across the state line and then bring it back into Virginia over the same route. It would not be normal, regular or usual to transport goods from Roanoke to Bluefield, W. Va., and back to Salem or back to Pearisburg.
King, *Chairman* and Hooker, *Commissioner,* concur."

In applying the *Eichholz* rule there might be some situations in which reasonable men might differ as to whether a given route is "the normal, regular or usual route." Be-

cause of that possibility the following letters were exchanged between counsel for the carrier and commerce counsel:

"Washington 6, D. C.

July 12, 1956.

William C. Seibert, Esquire
Commerce Counsel
State Corporation Commission
Commonwealth of Virginia
Richmond, Virginia

page 148 } "Dear Mr. Seibert:

"Yesterday I received from the Virginia State Corporation Commission its order holding that the operations complained of in case No. 13074 Commonwealth of Virginia *v.* Service Storage and Transfer Company, Inc., constitute operations in intrastate commerce in violation of certain provisions of the code of Virginia. I am reporting the results of this proceeding to officials of the company with recommendations and I expect to be advised on the company's intentions in respect to appeal or other action by July 20, 1956. In the circumstances, may I request that the effectiveness of the commission's order be delayed until August 1, 1956, so that the company may make determinations as to what future action, if any, should be taken.

"I desire to re-emphasize that it is the company's intention to comply with both the law of Virginia and the requirements of the Interstate Commerce Commission and the certificate which carrier holds. As we advised your Commission during the course of the hearing on this matter, the carrier is anxious to be informed with some degree of certainty as to what it may or may not do in transporting shipments between Virginia points through the gateway of Bluefield, West Virginia. The opinion of the Commission itself recognizes (Page 2, second paragraph) that

'transportation from points in a state to another point in the same state is *sometimes* interstate commerce.' The carrier's position on the matter is that it is entitled to know what standards or guides are to be used in determining when a particular movement constitutes interstate commerce and when it does not. In an effort to avoid protracted litigation on the question, we respectfully request your office to advise us informally as to what its judgment is on the matter. For as you can understand in the absence of an authoritative guide or standard, the carrier would continue to subject itself to prosecutions and fines on the acceptance and transportation of any shipment moving from one Virginia point to another. The carrier and its officials are fully aware that the problem is one that has a 'twilight zone' and presents difficulty for your enforcement staff. It believes, however, that the continued attitude of cooperation between the carrier and your office may result in an appropriate solution to the problem.

Very truly yours,

FRANCIS W. McINERNY."

page 149 } "COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

Richmond

July 13, 1956.

Francis W. McInerny, Esquire
1625 K. Street, N. W.
Washington 6, D. C.

Dear Mr. McInerny:

Company, Incorporated.

"A reasonable time is given for the payment of fines assessed by the Commission. We shall expect this fine to be paid in that time.

"Concerning the statement in your letter that the carrier is entitled to know what standards or guides are to be used in determining when a particular movement constitutes interstate commerce and when it does not, I will advise you that it appears to me you have a choice of two courses. Under the Rules of Practice and Procedure of this Commission, and I am enclosing a pamphlet containing these rules, you may ask for a declaratory judgment. This is referred to under Rule 13 as shown in the pamphlet attached. The alternative it appears to me, is to reach an agreement as to what might be considered interstate movement and what might be considered?

"I have your letter of July 12, regarding the decision of this Commission in Case No. 13074 in which a fine of $25.00 and costs was assessed against the Service Storage & Transfer intrastate movement on shipments in the territory served by the Service Storage and Transfer Company, Incorporated. I believe, as I stated to you before, that we could reach some sort of an agreement as to what points we would consider as properly interstate and unless we received a complaint with respect to the movement we would allow our investigators to observe the same understanding. This agreement might be reached after a conference between us.

"I am sure you understand that it is our desire to cooperate with you and your client at all times. We are here to assist as well as to regulate.

Very truly yours,

WILLIAM C. SIEBERT
Commerce Counsel."

page 150 } Thereafter our inspectors on the highways reported that the defendant had not changed its method of doing business; and the rule in the present case was issued. The rule came on for hearing on

November 29, 1956, and the evidence and argument followed the same pattern as in the prior case. Counsel for the defendant asked leave to file a brief and leave was granted on the assumption that the defendant would abide by the law laid down in the prior case in the meantime.

The final judgment in this case was entered on February 26, 1957. The judgment describes ten routes that the carrier has served in intrastate commerce and fines the defendant $500 for each of ten violations.

Counsel for the defendant makes the point that the Interstate Commerce Commission has jurisdiction to interpret the meaning of its own certificates. We do not find in the record evidence that that Commission has interpreted the defendant's certificate to mean that it is authorized to do what we have punished it for doing. There are of course limits on the authority of a federal commission to interpret certificates issued by it. It could not, under the guise of interpretation, enlarge the authority delegated to it by Congress or the power delegated to Congress by the Constitution.

Because of our federal form of government the present case is of great importance to the states. If the contentions so earnestly advanced by counsel for defendant page 151 } are correct, it would follow that a carrier holding a federal certificate of convenience and necessity to operate over Route 1 between Baltimore and Richmond could do the following things: (1) It could pick up freight in Alexandria, take it to Washington and bring it to Richmond. (2) It could pick up freight in Richmond, take it to Washington and bring it back to Ashland.

If the defendant is right in saying that its certificates *permit* it to haul by circuitous routes between Virginia cities, it necessarily follows that its certificates *compel* it to perform those circuitous movements. A common carrier *must* render all the services that its certificate *authorizes* it to render.

In issuing certificates of convenience and necessity the regulatory bodies are required by the governing laws to issue no more certificates than are necessary to serve the public. State certificates cannot authorize a carrier to cross the state line. If federal certificates can authorize the movement of goods from Richmond to Ashland or Richmond to Petersburg the state regulatory pattern will be destroyed and the beneficent purposes of the state laws cannot be accomplished. Our conclusions are (1) The Constitution does not authorize Congress to regulate the transportation of a parcel consigned from Roanoke to Salem; (2) Congress has not authorized the I.C.C. to regulate the transportation of a parcel consigned from Roanoke to Salem; (3) The I.C.C. has not authorized the defendant to transport a parcel consigned from Roanoke
page 152 } to Salem. The defendant may transport freight from one Virginia city to another only when a normal, regular or usual route between the cities crosses the state line.

Hooker, Commissioner, concurs.

APPENDIX III

INTERSTATE COMMERCE COMMISSION

No. MC-30471

SERVICE STORAGE & TRANSFER CO., INC.,—PETITION FOR DECLARATORY ORDER

Decided March 29, 1957.

Upon petition, found that certificate of public convenience and necessity issued to petitioner authorizes the transportation of general commodities, with exceptions, in interstate or foreign commerce, between points in described areas in Virginia, over irregular routes, through Bluefield, W. Va.

Francis W. McInerny for petitioner.

REPORT OF THE COMMISSION ON PETITION

DIVISION 1, COMMISSIONERS HUTCHINSON, WALRATH, AND MCPHERSON BY DIVISION 1:

This report deals with a petition dated January 14, 1957, filed by Service Storage & Transfer Co., Inc., of Bluefield, W. Va., under section 5(d) of the Administrative Procedure Act for a declaratory order, or, alternatively, for an order interpreting certificate No. MC-30471, respecting its right to engage in the transportation of property, in interstate or foreign commerce, from origin points in Virginia to destination points in that State through Bluefield, W. Va. No replies have been filed.

Petitioner was issued a certificate of public convenience and necessity on January 9, 1941, authorizing operation as a common carrier by motor vehicle, *inter alia*, of

general commodities, with certain exceptions, between Bluefield, W. Va., on the one hand, and, on the other, points in West Virginia, that part of Virginia west of U. S. Highway 29 and south of U. S. Highway 60, including points on the indicated portions of the highways specified. In No. MC-F-1881, petitioner on April 20, 1943, was authorized to purchase the operating rights of Arthur Goforth, doing business as Goforth Freight Lines, embraced in certificate No. MC-15815, and to unify such rights with those covered by petitioner's initial certificate. Certificate No. MC-15815 authorized the transportation of general commodities, with certain exceptions in interstate or foreign commerce, between Bluefield, Va., and points within 5 miles of Bluefield, Va.,[1] and those within 5 miles of Bluefield, W. Va., on the one hand, and, on the other, points in that part of Virginia and West Virginia within 75 miles of that territory. A certificate consolidating the authority embraced in petitioner's original certificate and the Goforth authority was issued July 27, 1943. This certificate also authorizes petitioner to transport general commodities, with certain exceptions, between Bluefield, W. Va., on the one hand, and, on the other, points in that part of Virginia north of U. S. Highway 60 which is within 80 miles of Bluefield, W. Va.

Since the issuance of the consolidated certificate, petitioner, by tacking the separate grants of authority at the common point of Bluefield, W. Va., has conducted through operations from points authorized by its original certificate to points authorized in the certificate acquired by purchase from Goforth through the gateway point of Bluefield, W. Va., including operations from origin points in Virginia to destinations in the same State. All such traffic has moved on interstate rates published by petitioner. Shippers using this service have been in-

[1] Bluefield, W. Va., is within 5 miles of Bluefield, Va.

formed that the route of movement would be through Bluefield, W. Va. Generally, the shipments are small, infrequently exceeding 500 pounds. They are consolidated at petitioner's terminal and move in its vehicles with other less-than-truckload shipments originated at or destined to points outside of Virginia.

Petitioner asserts that the Virginia State Corporation Commission, during the past several months, has instituted proceedings against it for the purpose of penalizing it for conducting operations from one point in Virginia to another point in that State, notwithstanding the fact that the shipments moved through Bluefield, W. Va. Additionally, staff members of the State Corporation Commission's office are said to have advised shippers and consignees that transportation performed by petitioner in either single-line or joint-line service from one Virginia point to another Virginia point through Bluefield, W. Va., does not constitute interstate commerce, and that they should cease tendering to petitioner traffic moving between Virginia points. There also is currently pending before the Virginia State Corporation Commission, a proceeding in which State enforcement officials contend that certain shipments handled from Virginia origins to Virginia destinations through Bluefield, W. Va., are not interstate and, accordingly, cannot lawfully be handled by petitioner.

This Commission has found in numerous proceedings that transportation of shipments in bona fide operations between points in the same State moving over authorized regular or irregular routes through another State or through an authorized gateway point in another State to which a carrier is authorized to transport a given shipment from a point in a particular State and from which it is authorized to transport the same shipment to a point in the same State, constitutes transportation in interstate commerce. Compare *Dixie Freight Lines, Inc., Common Carrier Application,* 24 M.C.C. 780 and *Atlantic Frt. Lines, Inc., Petition*

for Declaratory Order, 51 M.C.C. 175. In the absence of any showing that petitioner's use of its authorized route is a subterfuge to avoid State regulation, or other than a logical and normal operation through the carrier's headquarters we are of the opinion that petitioner's operations, in the manner described, constitute bona fide transportation in interstate commerce. This conclusion finds support in the fact that the routes employed between Virginia points are not unduly circuitous or impracticable but on the contrary are such as might normally be used by any carrier authorized to operate between the Virginia points involved, and that Bluefield, W. Va. is petitioner's headquarters and the base of other substantial operations to and from points in Virginia of which the operations challenged are only a small part.

We find that the operations described between points in Virginia through Bluefield, W. Va., are bona fide operations in interstate commerce within the authority granted to petitioner in certificate No. MC-30471.

The petition for a declaratory order construing or interpreting petitioner's certificate is satisfied by the foregoing. No order is necessary.

By the Commission, division 1.

HAROLD D. MCCOY,
Secretary.

(SEAL)

APPENDIX IV

Order of the Supreme Court of Appeals

VIRGINIA:

In the Supreme Court of Appeals held at the Court Library Building in the City of Richmond on Monday the 10th day of March, 1958.

Record No. 4748

SERVICE STORAGE AND TRANSFER COMPANY, INCORPORATED, *Appellant*,

against

COMMONWEALTH OF VIRGINIA, *Appellee*.

Upon an appeal of right from an order entered by the State Corporation Commission on the 26th day of February, 1957.

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the order aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is error in part in the order appealed from. It is therefore adjudged and ordered that the said order be, and the same is hereby affirmed, except in so far as the said order assesses fines for the transportation of goods originating in Roanoke, Lynchburg and Roanoke, Virginia, with respective destinations being Kimballton (Kimbleton), Marion and Abingdon, Virginia, and the cause is remanded to the said Corporation Commission with direction to amend its order with respect to the aforesaid three shipments in accordance with the views expressed in the said written opinion of this Court.

Which is ordered to be certified to the said Corporation Commission.

A Copy,

Teste:

H. G. TURNER
Clerk

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 3 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. [redacted]92

SERVICE STORAGE AND TRANSFER CO., INC., *Petitioner*

v.

COMMONWEALTH OF VIRGINIA, *Respondent*

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 1058

SERVICE STORAGE AND TRANSFER CO., INC., *Petitioner*

v.

COMMONWEALTH OF VIRGINIA, *Respondent*

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

RESPONDENT'S CONTENTION

The Commonwealth of Virginia contends that the decision of the Supreme Court of Appeals of Virginia rested on a non-federal ground and that consequently this Court should not assume jurisdiction. The alleged non-federal ground is not spelled out but a single proposition may be inferred from respondent's general argument which may be stated as follows:

That the Interstate Commerce Commission's interpretation of petitioner's interstate certificate of public convenience and necessity as expressed in *Service Storage and Transfer, Co., Inc.—Petition For Declaratory Order* 71 MCC 304 rests only on the assumption that petitioner's operations between points in Virginia over routes through West Virginia were

"bona fide." Respondent infers from that finding that a state agency is entitled independently to determine as a *matter of fact* whether an interstate motor carrier's operations are "bona fide" and then to conclude whether as a *matter of law* said operations are interstate.

ARGUMENT IN REPLY

1. Whether the Issue Before the Supreme Court of Appeals of Virginia and the Virginia State Corporation Commission Was One of Fact, Law or a Mixed Question of Law and Fact It Was Necessarily a "Federal Question."

A clear-eyed analysis of the Interstate Commerce Commission's decision in *Service Storage and Transfer Co., Inc.—Petition for Declaratory Order,* supra, reveals that the interpretation there given to petitioner's certificate constituted resolution of a pure question of law. This is demonstrated by the fact that in construing the certificate the Commission simply applied the rule of decision which it and the Federal Courts have followed for many years.

In *Transport Corporation of Virginia-Extension-Maryland* 43 MCC 716, 719 the Commission disposed of a question identical to that presented in the declaratory order proceeding as a pure question of law. The language employed merits direct quotation:

> "It is well settled that regular-route motor common carriers may operate over all combinations of their separately described routes and between all authorized points thereon, unless their service is specifically restricted in some particular. POWELL BROS. TRUCK LINES, INC. — PURCHASE — BRYAN, SUPRA. The same principle has been applied to regular-route common-carrier operations acquired by purchase, merger, or in proceedings under sec-

tion 207(a) of the act. DAYS, TRANSFER, INC.—PURCHASE—HANER, 39 M.C.C. 339; DIXIE FREIGHT LINES, INC., COMMON CARRIER APPLICATION, 24 M.C.C. 780. And, it has been held generally in motor-carrier proceedings under sections 5 and 212(b) of the act that where common-carrier regular-route and irregular-route authorities, or two or more common-carrier, irregular-route authorities are unified for operation by one carrier, through service may be provided between authorized points in both of such authorities, unless the public interest requires the imposition of a restrictive condition against the rendition of through service in whole or in part. The only requirement in these instances has been that there must be a point of service common to both operating authorities and the physical operation must be rendered through such common point. CAROLINA FREIGHT CARRIERS CORP.—PURCHASE—EDMUNDS, 36 M.C.C. 259, B & E. TRANSP. CO., INC.—PURCHASE—MERCHANTS TRANSP., INC. 36 M.C.C. 561; and CONSOLIDATED FREIGHTWAYS, INC. — PURCHASE — PACIFIC I. EXP., 38 M.C.C. 577."

The conclusions reached by the Interstate Commerce Commission in *Transport Corporation of Virginia* have been followed in *Aetna Freight Lines, Inc., Interpretation of Certificate* 48 MCC 610 they have also been followed by the Federal courts. See, *Century-Matthews Motor Freight* v. *Thrun,* 173 F. 2d 454 and *Interstate Common Carrier Council* v. *U. S.,* 84 F. Supp. 414, 420.

Although as stated above it is believed that the construction to be placed on petitioner's certificate presents a question of law only, it matters not, insofar as the issue concerning this Court's jurisdiction is concerned, whether the interpretation of a certificate

issued by the Interstate Commerce Commission is one of law, fact, or a mixed question of law and fact. This is so because an Interstate certificate, springing as it does from order of a Federal agency, and resting ultimately on a Federal statute and the Federal Constitution, must of necessity be interpreted finally by Federal authorities.

Even assuming, as respondent argues, that the character of petitioner's operation is to be determined by factual tests alone, and that such operations must be in "good faith" over "normal or usual routes" in order to be classed as interstate transportation under its interstate certificate, those tests can be applied only by the Interstate Commerce Commission and on review by Federal Courts. To conclude otherwise would permit state governments to resolve Federal issues with finality and frustrate the supremacy clause contained in Article VI of the Federal Constitution. The evils attending such results were delineated by this Court a century and a half ago in *Martin* v. *Hunter's Lessee,* 1 Wheaton 304, 4L. ed 97.

With respect to the precise issue now presented, i.e., the jurisdiction of this court, reference to *Missouri Pacific Railroad Company* v. *Stroud,* 267 U.S. 404, 69 L. ed. 683 is sufficient to demonstrate that only Federal forums may ultimately determine whether given transportation operations are in fact and law "interstate."

2. The "Federal Question" Was Timely and Properly Raised and Disposition Thereof Was an Essential Ingredient of the Decision of the Supreme Court of Appeals of Virginia.

Respondent does not contend that the federal question was not timely or properly raised. It argues in effect, however, that resolution of the federal question was not necessary to the decision of the Virginia Supreme Court of Appeals. It is difficult to perceive the validity of that argument, for if the questioned operations of petitioner were in violation of state law they were so only because said operations were not interstate and not authorized by its interstate certificate. Therefore, as a matter of logical priority is was necessary for both the State Corporation Commission and the Supreme Court of Appeals of Virginia first to determine whether petitioner's interstate certificate authorized the operations. As has been shown above interpretation of petitioner's certificate presents a federal question.

That both the State Corporation Commission and the Virginia Supreme Court of Appeals recognized the necessity to decide, and did decide the federal question is made manifest by their respective statements of the essential issue. The State Corporation Commission said:

> "The interesting question is whether the interstate character of the movement turns on whether it *is* an interstate movement or whether the I.C.C. *says* it is an interstate movement." (Petition, Page 16a)

The Supreme Court of Virginia said:

> "The question for decision is whether the instant shipments involved intrastate or interstate commerce." (Petition, page 9a)

CONCLUSION

Neither the opinion of the Supreme Court of Appeals of Virginia nor that of the State Corporation Commission clearly state or even suggest that their decisions or either of them rested on non-Federal grounds. Much to the contrary both opinions make it abundantly clear that the federal issue was presented and consideration thereof was necessary to decision.

Respondent's present contention that the State Court's action rested on independent and adequate state grounds is manifestly unsound. Accordingly, petitioner prays that this court grant certiorari and entertain the cause on the merits.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 92

SERVICE STORAGE AND TRANSFER CO., INC., *Petitioner*

v.

COMMONWEALTH OF VIRGINIA, *Respondent*

On Writ of Certiorari to the Supreme Court of Appeals of Virginia

BRIEF FOR PETITIONER

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On Writ of Certiorari to the Supreme Court of Appeals of Virginia

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Supreme Court of Appeals of Virginia is reported as *Service Storage and Transfer Co., Inc.*, v. *Commonwealth of Virginia*, 199 Va. 797, 102 S.E. 2nd 339. The opinion of the State Corporation Commission of the Commonwealth of Virginia is set forth as *State Corporation Commission* v. *Service Storage and Transfer Co., Inc.*, in the record. (R. 74)

The opinion of the Interstate Commerce Commission which is in conflict with that of the Supreme Court of Appeals of Virginia is reported as *Service Storage*

and Transfer Co., Inc.—Petition for Declaratory Order, 71 M.C.C. 304.

JURISDICTION

The judgment of the Supreme Court of Appeals of Virginia was entered on March 10, 1958. (R. 88) The petition for certiorari was filed on June 9, 1958, and was granted on October 13, 1958. (R. 98). The jurisdiction of this Court was invoked under Title 28, U.S.C., 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Federal Constitutional Provisions, Article I, Section 8

* * *

"The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;".

* * *

Federal Constitutional Provisions, Article VI

* * *

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

* * *

Federal Statutes

Interstate Commerce Act, Part II, Section 203(10); Title 49, U.S.C., Section 303(10).

"The term 'interstate commerce' means commerce between any place in a state and any place in another state or between places in the same state through another state, whether such com-

merce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water."

Interstate Commerce Act, Part II, Section 204(c); Title 49, U.S.C., Section 304(c);

"Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint."

Virginia Statutes

Title 56, Code of Virginia, Section 278; *Vol. 8,* page 235:

"No common carrier by motor vehicle or restricted common carrier by motor vehicle not herein exempted shall engage in intrastate operation on any highway within the state without first having obtained from the Commission a certificate of public convenience and necessity authorizing such operation, and a statement of the State Highway Commission that the law applicable to the proposed route or routes has been complied with as to size, weight, and type of vehicles to be used, and a like statement as to any increase in size, weight, and type of vehicles proposed to be operated by the applicant after such application is granted."

Title 56, Code of Virginia, Section 304.12; *Vol. 8,* Cum. Supp.:

> "The Commission may, by judgment entered after a hearing on notice duly served on the defendant not less than ten (10) days before the date of the hearing, if it be proved that the defendant made any misrepresentation of a material fact to obtain a warrant, exemption card or registration card, has made any improper use of any warrant, exemption card, registration card, classification plate, identification marker or identifying number, has violated any law of this state regulating the operation of motor vehicles for compensation on the highways of this state, has failed to make any report required by the Commission, has failed to pay any fee or tax properly assessed against him or has failed to comply with any lawful order, rule or regulation of the Commission, impose a penalty not exceeding One Thousand Dollars ($1,000.00), which shall be collectible by the process of the Commission as provided by law."

THE QUESTIONS PRESENTED

(1) Whether a state agency lawfully may impose criminal sanctions on a motor common carrier for conducting interstate operations in accordance with the carrier's interstate certificate of public convenience and necessity as construed by the Interstate Commerce Commission.

(2) Whether the enforcement of a state statute in a manner which requires discontinuance of motor carrier operations authorized by order of the Interstate Commerce Commission is in conflict with Part II of the Interstate Commerce Act and in contravention of the "Commerce clause" of Article I, Section 8 of the Federal Constitution.

(3) Whether a state agency which desires a certificated interstate motor carrier to discontinue allegedly unlawful operations must seek such relief from the Interstate Commerce Commission as provided in Section 204(c) of Part II of the Interstate Commerce Act.

STATEMENT OF THE CASE

(a) The Specific Violations Alleged

The Commission's Rule (R. 2) sets forth a total of seventeen shipments which are alleged to have been intrastate in character and, therefore, in violation of the provisions of Chapter 12, Title 56 of the Code of Virginia. The origins and destinations of the specific shipments involved may be shown in summary form as follows:

Origin	Destination	No. of Shipments
Roanoke, Va.	Coeburn, Va.	4 shipments
Roanoke, Va.	Big Stone Gap, Va.	3 shipments
Roanoke, Va.	Oakland, Va.	1 shipment
Roanoke, Va.	Norton, Va.	1 shipment
Lynchburg, Va.	Coeburn, Va.	1 shipment
Bluefield, Va.	Haysi, Va.	1 shipment
Roanoke, Va.	Glen Lyn, Va.	1 shipment
Lynchburg, Va.	Draper, Va.	1 shipment
Roanoke, Va.	Wytheville, Va.	1 shipment
Bristol, Va.	Carbo, Va.	1 shipment
Bristol, Va.	Cranes Nest, Va.	1 shipment
Bristol, Va.	Wise, Va.	1 shipment

Petitioner admitted that the shipments in question were actually transported by it, but denied that such shipments were moved in intrastate commerce. As a matter of defense, it was asserted that all of the questioned shipments in moving from origin to destination were transported through Bluefield, W. Va., as

required by the certificate of public convenience and necessity which it holds from the Interstate Commerce Commission (R. 31-33—Exhibit No. 2). The fact that all operations involving the transportation of shipments from Virginia origins to Virginia destinations were conducted through the Bluefield, W. Va., gateway was affirmatively established (R. 34, 35, 39, 46) and stipulated as fact (R. 22).

(b) Petitioner's Interstate Commerce Certificate and the Operations Performed Thereunder

Exhibit No. 2 (R. 100) reveals that petitioner is authorized under its Interstate certificate to transport property (general commodities) as a motor common carrier in interstate commerce:

> (1) Between Bluefield, Va., and points and places within 5 miles of Bluefield, Va., and those within 5 miles of Bluefield, W. Va., respectively, on the one hand, and, on the other points and places in that part of Virginia and West Virginia within 75 miles of that territory. (Second paragraph under General Commodity Description)

The carrier is also authorized to conduct operations:

> Between Bluefield, W. Va., on the one hand, and, on the other, points and places in West Virginia, to that part of Virginia west of U. S. Hwy 29 and south of U. S. Hwy 60 including points and places on the indicated portions of the highways specified, and that part of Virginia north of U. S. Hwy 60 which is within 80 miles of Bluefield, W. Va. (Third paragraph under General Commodity Description)

Under petitioner's construction of its certificate and that of the Interstate Commerce Commission, the carrier conducts operations between points in Virginia,

on the one hand, and points in West Virginia, on the other hand, within the limits of the authorities set forth above. The carrier also accepts for transportation shipments moving from one Virginia point within the described territory to a second Virginia point within the described territory. This is done by using the two separate grants set forth above in combination (R. 34-35). It is as though two independent carriers were interchanging freight, one with the other at Bluefield, W. Va. (R. 35). To exemplify, upon receiving a request to transport a shipment from Lynchburg, Va., to Draper, Va., the carrier would pick up the shipment at Lynchburg under the authority contained in the first paragraph set forth above and transport it to its terminal at Bluefield, W. Va. Upon arrival at that point, the shipment would be transported to the Virginia destination under the authority contained in the second paragraph set forth above (R. 34-35).

On traffic handled between Virginia origin and destinations properly published and lawful interstate rates are applied (R. 44-45), and the Virginia shipping public is advised that tariff charges of petitioner are "applicable only on interstate traffic" (R. 45). Petitioner's tariff charges for interstate movements of freight between Virginia points sometimes result in costs higher than those assessed by intrastate carriers (R. 45). Petitioner's solicitation for traffic moving from one Virginia point to a second Virginia point is confined to traffic moving interstate. (R. 44-45) The shippers using petitioner's service from Virginia origins to Virginia destinations are aware that the traffic moves on interstate tariffs and that the traffic is physically moved through Bluefield, W. Va. (R.

66-71). Only a minor portion of petitioner's interstate transportation involves a movement of traffic from Virginia origins to Virginia destinations. (R. 106-107). During the past three years petitioner has derived approximately 3 per cent of its total interstate revenues from the transportation of traffic moving from one Virginia point to another Virginia point (R. 43). The minor amount of traffic that is moved between Virginia points consists in the main of small shipments (R. 28-29-37). The small shipments moving between Virginia points are consolidated with other interstate shipments moving between points in Virginia, on the one hand, and points in other states, on the other (R. 37-38). To illustrate, a consolidated truckload of small shipments is originated in Virginia. The vehicle is then dispatched to Bluefield, W. Va., where all shipments are handled through petitioner's terminal facilities at that point. At Bluefield, W. Va., shipments destined to Virginia receivers are consolidated in a vehicle with other Virginia traffic coming into the Bluefield, W. Va., terminal from non-Virginia origins (R. 34-38). The route of movement followed by some shipments handled by the carrier is necessarily longer than the shortest highway route available between the origin and destination points of the shipments involved. This is true of traffic handled by the carrier between Virginia, on the one hand, and West Virginia, on the other, as well as betwen Virginia points (R. 40-42, 106-106). However, the fact that a given small shipment must traverse a circuitous routing does not render the operation non-feasible, impracticable or unprofitable (R. 42).

(c) The Interpretation of Petitioner's Certificate by the Interstate Commerce Commission

Long prior to the institution of criminal proceedings against petitioner by the Virginia authorities the Interstate Commerce Commission set forth its interpretation of the certificate of public convenience and necessity held by petitioner. In approving acquisition of control of petitioner by Smith's Transfer Corporation in MC-F-5361, *Smith's Transfer Corporation of Staunton, Va.—Control—Service Storage and Transfer Company, Inc.*, 59 M.C.C. 803 (report not printed in full in the Commission's Motor Carrier Reports), the Interstate Commerce Commission found that the federal certificate of petitioner authorized operations of the type later questioned by the Virginia Commission. In the unpublished report of the federal Commission in that proceeding it was found as follows:

> "Under its existing authority, Service Storage may lawfully perform a cross-haul service under a combination of its radial rights by operating for example: between points in West Virginia within 75 miles of the base area on the one hand and on the other points in Virginia on and west of U. S. Hwy 29 and on the south of U. S. Hwy 60 and points in the three Kentucky counties provided such operations under a combination of the various rights are routed through Bluefield as a gateway".

In the same report of the Commission it was found:

> "While Smith's Transfer interlines with Service Storage exclusively at Bluefield, which it proposes to continue, they nevertheless have available for interline a number of other legally authorized points, for example, Lynchburg, Lexing-

ton and Covington, from which Service Storage could transport the shipments to points in the three Kentucky counties and to points in Virginia and West Virginia within 75 miles of Bluefield provided such shipments are in turn routed by it through Bluefield."

During the pendency of the enforcement proceedings before the Virginia State Corporation Commission petitioner filed with the Interstate Commerce Commission its request for an order declaring the scope of operations authorized under its federal certificate. In *Service Storage and Transfer Co., Inc.—Petition for Declaratory Order*, 71 M.C.C. 304, the federal Commission reaffirmed its earlier findings and held that the operations of petitioner which had been brought into question by the Virginia Commission were in fact *bona fide* and authorized by petitioner's interstate certificate.

(d) The Decisions of the Interstate Commerce Commission With Respect to Its Interpretation of Petitioner's Federal Certificate Are Supported by Reason and Precedent

In *Transport Corporation of Virginia—Extension—Maryland*, 43 M.C.C. 716, the federal Commission reaffirmed the consistently followed principle that separate grants of interstate operating authority (either regular route or irregular route) may be used in combination so as to permit through operation between points on the separately described routes or areas. There the Commission stated: (Page 719)

"It is well settled that regular-route motor common carriers may operate over all combinations of their separately described routes and between all authorized points thereon, unless their service is specifically restricted in some particular. *Powell*

Bros. Truck Lines, Inc.—Purchase—Bryan, supra. The same principle has been applied to regular-route common-carrier operations acquired by purchase, merger, or in proceedings under section 207(a) of the act. *Days Tranfer, Inc.—Purchase—Haner,* 39 M.C.C. 339; *Dixie Freight Lines, Inc., Common Carrier Application,* 24 M.C.C. 780. And, it has been held generally in motor-carrier proceedings under sections 5 and 212(b) of the act that where common-carrier regular-route and irregular-route authorities, or two or more common-carrier irregular-route authorities are unified for operation by one carrier, through service may be provided between authorized points in both of such authorities, unless the public interest requires the imposition of a restrictive condition against the rendition of through service in whole or in part. The only requirement in these instances has been that there must be a point of service common to both operating authorities and the physical operation must be rendered through such common point. *Carolina Freight Carriers Corp.—Purchase—Edmunds,* 36 M.C.C. 259, *B & E. Transp. Co., Inc.—Purchase—Merchants Transp., Inc.* 36 M.C.C. 561; and *Consolidated Freightways, Inc.—Purchase—Pacific I. Exp.,* 38 M.C.C. 577.)"

The conclusions reached by the Interstate Commerce Commission in *Transport Corporation of Virginia* have been followed in *Aetna Freight Lines, Inc., Interpretation of Certificate,* 48 M.C.C. 610. They have also been followed by the Federal courts. See, *Century-Matthews Motor Freight* v. *Thrun,* 173 F. 2d 454 and *Interstate Common Carrier Council* v. *U.S.,* 84 F. Supp. 414, 420.

(c) The Action of the State Corporation Commission and the Supreme Court of Appeals of Virginia

The State Corporation Commission in its judgment entered February 26, 1957 (R. 72) ordered the imposition of a fine of $500.00 for each of seven of the 17 shipments alleged as violations in the Commission's Rule to Show Cause. Additionally it assessed fines of $500.00 on each of three shipments which were not alleged as violations in the Commission's Rule to Show Cause. The State Corporation Commission did not impose fines on the 10 remaining violations alleged in its Rule. Accordingly it may be inferred that the shipments transported by petitioner from Roanoke, Virginia, to Coeburn, Virginia, Big Stone Gap, Virginia, Oakland, Virginia, and Norton, Virginia, and from Lynchburg, Virginia, to Coeburn, Virginia, although transported through Bluefield, West Virginia, even in the judgment of the Virginia authorities constitute interstate commerce.

The State Corporation Commission's conclusion that certain of the alleged violations were intra-state in character rests on a single undisputed fact finding, i.e., that the physical route of movement traversed by the individual shipments in question did not follow "the normal, regular or usual route" (R. 82). In finding that several of petitioner's vehicles did not follow the shortest highway route as determined from the state highway map of Virginia and concluding that such operations were not bona fide interstate commerce and therefore intra-state commerce, the State Corporation Commission relies almost exclusively on this Court's decision in *Eichholz* v. *Public Service Commission of Missouri,* 306 U.S. 268.

On review of the State Corporation Commission's action, the Supreme Court of Appeals of Virginia adopted the views of the Commission and in so doing again placed primary reliance on *Eichholz*. It is to be noted that although the Interstate Commerce Commission's decision in *Service Storage and Transfer Co., Inc., Petition for Declaratory Order,* supra, was brought to the attention of the Virginia Court, that Court omits discussion of the Interstate Commerce Commission's conclusions and, in fact, makes no reference whatever to the action of the federal Commission.

ARGUMENT

THE OPERATIONS INVOLVED ARE INTERSTATE IN CHARACTER UNDER COMPLETE FEDERAL REGULATION, AND MAY NOT BE REGULATED BY STATE AGENCIES THROUGH THE IMPOSITION OF CRIMINAL PENALTIES OR OTHERWISE

(a) The Operations Are Interstate by Definition

The Federal Congress in enacting the Motor Carrier Act of 1935 intended to and did design a complete scheme of regulation for interstate transportation by motor carrier. The definition of interstate commerce as contained in the Act is "commerce between any place in a state and any place in another state or between places in the same state through another state". The evidence in the instant proceeding demonstrates quite clearly that the questioned operations of petitioner since they were all performed through Bluefield, West Virginia, come within the term "interstate commerce" as defined by the Congress in the Motor Carrier Act.

It has been shown that the questioned operations constitute a minor portion of the business of petitioner but that nonetheless the operations are conducted in conjunction with the transportation of traffic

between Virginia and other states. Petitioner's method of handling freight between points in Virginia is identical to that employed in the performance of service between Virginia and other states including West Virginia. In many cases the freight moving from Virginia origins to Virginia destinations is transported in a vehicle which at the same time (for at least a portion of the movement) is handling traffic moving to other states.

(b) The Operations Have Been Declared to be Interstate by the Interstate Commerce Commission

As hereinbefore pointed out, the Interstate Commerce Commission on two separate occasions has found under its own construction of its own order, i.e., petitioner's certificate, that the operations alleged to be intra-state by the Virginia authorities are in fact interstate in character and subject to the regulation of the Interstate Commerce Commission.

In the *Declaratory Order* proceeding the Interstate Commission cites *Atlantic Freight Lines, Inc., Petition for Declaratory Order,* 51 M.C.C. 175, in support of its ultimate conclusions. That case which presented factual and legal issues in all essential respects identical to those presented here, in petitioner's view, warrants careful consideration by this Court because of the Commission's thorough development of the subject matter and its well reasoned conclusions.

As disclosed by the report of the Commission in the *Atlantic Freight Lines case,* supra, the carrier there, prior to requesting the Interstate Commerce Commission to define the limits and scope of its operating authority, had been ordered by the Pennsylvania Public Utility Commission to cease and desist from the ren-

dition of service between points in Pennsylvania over its interstate route through Baltimore, Md. The order of the Pennsylvania Commission was sustained by the Superior Court of Pennsylvania, *Atlantic Freight Lines, Inc.* v. *Pennsylvania Public Utilities Commission,* 60 A (2d) 589. The Supreme Court of Pennsylvania and this Court refused to review the case. Thereafter, the Interstate Commerce Commission entertained the carrier's Petition for a Declaratory Order in spite of the carrier's failure to obtain further judicial review because it found:

> "* * * that primary jurisdiction to determine the bona fides of interstate transportation is vested in this Commission." 51 M.C.C. 175, 186.

As authority for that proposition the Interstate Commerce Commission referred to the opinion of the Superior Court of Pennsylvania in *Atlantic Freight Lines, Inc.* v. *Pennsylvania Public Utilities Commission,* supra, wherein it was held:

> "That the question of what is interstate commerce is one of fact; that since enactment of the Motor Carrier Act of 1935, the conclusive determination of that fact is vested in this [federal] Commission; that when this Commission has determined that certain transportation is bona fide interstate transportation, no state commission or court may thereafter collaterally attack such finding in another proceeding; but, where this Commission has not determined the question, the State Commission or court must use its best judgment in initially doing so." 51 M.C.C. 178.

Although the Pennsylvania Public Utilities Commission was charged with substantially the same responsibility in connection with the *Atlantic* matter

that the Virginia Commission has in connection with the instant proceeding and, although the Pennsylvania Commission attempted to support its position with the identical arguments and authorities that the Virginia Commission relies upon, the carrier involved in the Pennsylvania case was finally permitted to conduct operations between points in Pennsylvania in accordance with the interpretation placed upon its certificate by the Interstate Commerce Commission.

Instead of accepting the Interstate Commerce Commission's decision in *Atlantic* the Virginia authorities have amended federal legislation and redefined "interstate commerce" as follows:

> "commerce between places in the same state through another state when such commerce moves over a 'normal, regular or usual route' between the points involved."

In support of its attempt to modify the definition contained in the Interstate Commerce Act, the State Corporation Commission and the Virginia Supreme Court of Appeals look to this Court's opinion in *Eichholz* v. *Public Service Commission of Missouri*, 306 U.S. 268.

In the case relied upon by the Commonwealth of Virginia, Eichholz, the defendant, prior to 1935 had obtained a permit from the Missouri Public Service Commission to conduct operations as a motor carrier of property in interstate commerce. Since the Federal Government in the period prior to 1935 had not subjected interstate motor carrier operations to regulation, it was, of course, proper that such operations be regulated, within limits, by state agencies. After the passage of the Federal Motor Carrier Act in 1935,

Eichholz applied to the Interstate Commerce Commission for a "grandfather permit" under the provisions of Section 209(a)(1) of Part II of the Interstate Commerce Act. While that application was pending, the Missouri Commission had determined that certain of Eichholz' operations were, in fact, intrastate in character. Notwithstanding the fact that the questioned operations between Missouri points had been conducted across the state line of Missouri, it was held by the Missouri authorities that the operations of the defendant constituted a subterfuge and were conducted across the state line solely for the purpose of escaping Missouri regulation. Accordingly, the defendant's Missouri interstate permit was withdrawn by the state authorities. On review the action of the state agency was sustained by this Court. The reason underlying this Court's approval of the Missouri Commission's assumption of jurisdiction is, in our view, expressed with crystal clarity in Chief Justice Hughes' second finding, 306 U.S. 268, 273:

> "When the Commission revoked the permit, the Interstate Commerce Commission had not acted upon appellant's application under the Federal Motor Carrier Act and meanwhile the authority of the state body to take appropriate action under the state law to enforce reasonable regulations of traffic upon the state highways had not been superseded."

The above-quoted language takes on added significance when read in the light of *H. P. Welch Co.* v. *New Hampshire,* 306 U.S. 79. In that case the carrier challenged the validity of a New Hampshire statute which prescribed twelve hours as the maximum on-duty time for drivers of motor vehicles engaged in specified

transportation. Inter alia, the carrier contended that its interstate operation could not be made subject to the New Hampshire statute because the Interstate Commerce Commission had been empowered through the enactment of the Federal Motor Carrier Act to "establish reasonable requirements with respect to qualifications and maximum hours of service of employees and safety of operation and equipment." This Court approved the action of the state agency holding that the petitioner had violated the provision of the New Hampshire Act involved and observed: (306 U. S. 79, 84):

> "The violations for which the State Commission suspended appellant's registration certificates occurred after the effective date of the Federal Act and before the Interstate Commerce Commission made its order."

Continuing, the court stated:

> "Without so deciding, we assume, so far as concerns the periods of continuous service condemned by the State Commission, that when the Federal Regulations take effect they will operate to supersede the challenged provisions of the state statute."

The opinions of the Supreme Court in both *Eichholz* and *Welch* reflect the application of the principle that until the Federal Government has acted the state governments have authority within limits, to regulate interstate commerce. Equally clear in the opinions, however, is the principle that when the Federal Government has "occupied the field" the state governments are precluded from exercising jurisdiction.

In the case at bar, it is clear beyond question that the "field" in which the State Corporation Commission

has sought to assume jurisdiction and exercise control has been completely "occupied" by the Federal Government. Since the Federal Government has acted, the State of Virginia has been divested of all power to exercise control in this area. The foregoing conclusion is supported by convincing authority contained in *Bethlehem Steel Co.* v. *New York Labor Relations Board,* 330 U.S. 767. There the Court stated, page 773:

> "In other cases, Congress has passed statutes which initiate regulation of certain activities, but where effective regulation must wait upon the issuance of rules by an administrative body. In the interval before those rules are established, this Court has usually held that the police power of the state may be exercised (Citing H. P. Welch Co. v. New Hampshire, supra) but when Federal administration has made comprehensive regulations effectively governing the subject matter of the statute, the Court has said that a state regulation in the field of the statute is invalid even though that particular phase of the subject has been taken up by the Federal Agency."

If there ever existed any doubt as to whether a state could determine what carriers could or could not operate in interstate commerce after the enactment of the Federal Motor Carrier Act, such doubt was removed by this Court's decision in *Castle* v. *Hayes Freight Lines,* 348 U.S. 61. In that case Hayes Freight Lines, a motor carrier authorized to conduct interstate operations by the Interstate Commerce Commission, brought under attack an Illinois statute which authorized the state to punish a carrier who had violated the state's size and weight law repeatedly by suspending the carrier's right to use the highways of the State of Illinois. The Illinois State Supreme Court held that punishment or suspension provided by the state statute

could not be imposed on the interstate operations of the respondent Hayes. On review by this Court it was held that Illinois suspension of interstate transportation was in conflict with the Federal Motor Carrier Act which is the supreme law of the land. At page 63 this Court stated:

> "Congress in the Motor Carrier Act adopted a comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce. The federal plan of control was so all-embracing that former power of states over interstate motor carriers was greatly reduced. No power at all was left in states to determine what carriers could or could not operate in interstate commerce. Exclusive power of the Federal Government to make this determination is shown by Section 306 of 49 USC which describes the conditions under which the Interstate Commerce Commission can issue certificates of convenience and necessity. And Section 312 of the same title provides that all certificates, permits or licenses issued by the Commission 'shall remain in effect until suspended or terminated as herein provided.' But in order to provide stability for operating rights of carriers, Congress placed within very narrow limits the Commission's power to suspend or revoke an outstanding certificate. No certificate is to be revoked, suspended or changed until after a hearing and a finding that a carrier has wilfully failed to comply with the provisions of the Motor Carrier Act or with regulations properly promulgated under it. Under these circumstances, it would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier's commission-granted right to operate. It cannot be doubted that suspension of this common carrier's right to use Illinois highways is the equivalent of a partial suspension of its federally granted certificate."

In *Roundtree* v. *Terrell*, 22 F. Supp. 297, the U. S. District Court for the Northern District of Texas held in factual circumstances not unlike those presented here, that the Texas Railroad Commission could not unlawfully restrain movement of freight by an authorized interstate carrier from Fort Worth to Texarkana, Texas, through a state-border terminal located in Arkansas. The Court's holding was reached simply by application of the definition of "interstate commerce" as set forth in the Federal Motor Carrier Act. At page 299 the Court stated:

> "The freight passed from Texas into Arkansas. When it does that, it is interstate commerce. The Federal Motor Carrier Act, 49 U.S.C.A. Section 303(a)(10), defines interstate commerce as that commerce which passes from state to state, or which passes from a place in one state to another place in the same state, through another state. It is commerce that is not entirely within the limits of a single state. That the carrier has seen fit to establish his terminus in Texarkana, Ark., instead of Texarkana, Tex., may not be criticized as an illegal subterfuge, if it is an actual fact. There is nothing wrong, nothing illegal, about putting a depot in Arkansas instead of in Texas. If by so doing the carrier escapes Texas taxes or Texas supervision, he is merely exercising business acumen. He pays for the service which he renders his customers. If he carries freight from Dallas to his depot in Arkansas, then unloads it, under a good-faith plan, and subsequently, when daylight comes, delivers it to his customers in Texarkana, Tex., he is doing what he has a right to do. The termini are in Texas and Arkansas. That sort of transportation is amenable solely to the national government. Any attempt to hamper it must be viewed as illegal, unconstitutional, and void."

The Virginia Commission having accepted and applied *Eichholz* sought to rationalize that acceptance by reference to *Dohrn Transfer Co.* v. *Hoegh,* 116 F. Supp. 177 (R. 77). That case, carefully read, rather than lending support to the decision of the Commission strengthens the position of petitioner. A three-judge Federal District Court refused to decide the constitutionality of an Iowa statute which prohibited the transportation of freight by for-hire motor carriers in the absence of a state certificate between points in Iowa. Prohibited operations included "the crossing of any state line of the state of Iowa." The carrier plaintiff had crossed state lines under an Interstate certificate in the movement of traffic from one Iowa point to another. The Court refused to hold the statute in question unconstitutional because such action was not required to dispose of the issues involved. The significant point of the case is that the Court did enjoin the Iowa Commissioners from enforcing the statute against the plaintiff in an unconstitutional manner, stating, 116 F. Supp. 190:

> "It is not deemed necessary in the present case to make a declaration as to the constitutionality of Section 325.6 as amended. The plaintiff will be afforded adequate relief by treating the provisions of that Section as not applicable to the plaintiff and enjoining the members of the Iowa Commerce Commission accordingly."

(c) The Questions of Motive, Good Faith or Intention Are Not Material to the Ultimate Issue, But on the Assumption That They Are the Commission Has Failed to Prove That Petitioner's Questioned Operations Were Conducted in Bad Faith

In *Western Union Telegraph Company* v. *Speight,* 254 U.S. 17, it was held by the Supreme Court of the United States that the transmission of a tele-

gram from a point to another point in the same state through a point in a second state is interstate commerce. It was there stated by Justice Holmes at pages 18-19: "That the transmission of a message through two states is interstate commerce as a matter of fact" and that "The fact must be tested by the actual transaction" and "Moreover, the motive would not have made the business intrastate." On the authority of that case petitioner contends that the issue of good faith or motive is not involved. See also *Roundtree* v. *Terrell,* supra. Additionally, petitioner contends that the bona fides of its operation has been found by the Interstate Commerce Commission, and the issue is foreclosed. However, even accepting the rule of decision applied by the State Commission, petitioner contends that the record compels the conclusion that such standards have been met. It should be remembered that, since the case below was a criminal proceeding involving as it did several penalties, the burden of proof rested with the Commission. Under the Commission-adopted formula, the Commission was required to establish by probative evidence that the carrier's operations were not in "interstate commerce" by demonstrating that the shipments involved were not transported in "good faith" through a point in West Virginia. This the Commission failed to do. Petitioner, however, did not rest on its jurisdictional or legal defense; it submitted affirmative evidence which required that the Commission find:

(1) That all of the questioned shipments were transported by petitioner through Bluefield, West Virginia.

(2) That all of the questioned shipments were transported subject to rates published in petitioner's interstate tariffs.

(3) That petitioner's rates for the traffic involved were sometimes higher than prevailing rates of intrastate carriers.

(4) That petitioner's solicitation of the Virginia shipping public is confined to interstate traffic.

(5) That those members of the Virginia shipping public that have used the service of petitioner are aware that traffic handled is transported through Bluefield, West Virginia.

(6) That petitioner has derived an insignificant portion of its total revenues from the transportation of traffic between Virginia points (approximately 3 per cent).

(7) That petitioner's transportation of traffic between Virginia points consists in the main of less-truckload shipments.

(8) That petitioner's transportation of shipments between Virginia points is consolidated with other interstate traffic moving between points in Virginia and points in other states.

(9) That the profitability and practicality of petitioner's operations as a whole does not relate to the route of movement taken by an individual shipment because of the nature of the traffic handled by petitioner and because petitioner's operation is essentially one of distribution.

(10) That the circuity of mileage traversed by certain Virginia shipments is in many cases no greater than the circuity of mileage traversed by shipments moving from Virginia to West Virginia.

The Commission ignored the evidence supporting the foregoing findings and refused to make findings on these elements because it had already arbitrarily adopted the "normal, regular or usual route" principle which obviously has no application to an irregular route distribution carrier of small shipments. If the Commission had made a careful analysis of *Eichholz*, it would have found that the carrier in that case, contrary to petitioner, conducted industrious solicitation, that it transported traffic at lower rates than intrastate carriers, gave no terminal handling to the traffic, specialized in truckload or volume traffic, and did not possess an interstate certificate at the time.

Petitioner has demonstrated that *Eichholz* has no application in the present circumstances because the Interstate Commerce Commission has acted and ousted the state of jurisdiction. However, assuming, *arguendo*, that the *Eichholz* doctrine validly could be applied, its proper application to the record facts in the instant proceeding require the conclusion that petitioner's operations did not constitute a subterfuge to defeat or evade state regulation. Proof of the foregoing proposition is established by contrasting the elements of petitioner's operations with those of Eichholz.

The inherent weakness of the Commission's finding of bad faith compelled an attempt to support its conclusions with a practical argument. The Commission in its opinion (R. 82) asserts that if petitioner is right in its interpretation of its certificate:

> "The permit not only permits it to haul by circuitous routes between Virginia cities it necessarily follows that its certificates compel it to perform those circuitous movements."

For purposes of this case it can be agreed that a common carrier is required to perform the operations authorized in its certificate. As a matter of fact, Exhibit No. 2, in the 3rd Ordering Paragraph contains the following language:

> "It is further ordered, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate."

It was because of the language immediately above quoted that petitioner throughout this proceeding has resisted the interference of the state authorities. Petitioner quite reasonably interpreted the quoted language to mean that the Interstate Commerce Commission in issuing the certificate required it to perform all of the services authorized. In any event whatever questions may have existed relative to petitioner's certificate, the Declaratory Order of the Federal Commission, makes it abundantly clear that petitioner is required to perform service consistent with the Federal Commission's interpretation of the certificate. The State Corporation Commission's opinion on this point has no merit for there is no evidence of record to prove or even to suggest that the petitioner has in any way limited its service short of the scope authorized by the Interstate Commerce Commission. The record as a whole quite convincingly establishes that the carrier has accepted and transported all traffic offered to it by the shipping public. The extreme examples resorted to in the opinion of the Commission are of no significance, particularly since the hypothetical examples presented have no record support.

THE LEGALITY OF AN INTERSTATE MOTOR CARRIER'S OPERATIONS PERFORMED PURSUANT TO A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY ISSUED BY THE INTERSTATE COMMERCE COMMISSION MAY ONLY BE CHALLENGED IN A FEDERAL FORUM

Petitioner and the Commonwealth of Virginia agree that transportation of freight from a Virginia origin to a Virginia destination can be either intra-state or interstate commerce depending on the circumstances and the conditions attending the movement. It is petitioner's position that traffic transported between Virginia points through a sister state in accordance with a certificate issued by the Interstate Commerce Commission is *interstate* in character and not subject to state control or regulation. On the other hand, the Commonwealth of Virginia contends that it is not bound by the terms of a motor carrier's interstate certificate as interpreted by the issuing agency, the Interstate Commerce Commission, but holds that traffic transported between Virginia points is interstate *only* when such traffic moves through a sister state over the "normal, regular or usual route."

The conflicting contentions above stated necessarily raise a fundamental jurisdictional question—i.e. whether state or federal forums are empowered to decide with finality whether given activities are interstate or intrastate. Statement of the question appears to make its resolution obvious—particularly where, as here, the federal legislature has created a comprehensive scheme of regulating interstate motor transportation and has promulgated a definition of "interstate commerce" intended for application by the Interstate Commerce Commission in issuing and construing operating authorities of the type held by peti-

tioner. Even the federal judiciary, including this Court, has exercised an extreme reluctance to disturb the Interstate Commerce Commission's conclusions interpreting its own orders. *Andrew G. Nelson, Inc.* v. *Jessup,* 134 F. Supp. 221; *Noble* v. *U.S.,* 319 U.S. 88. To permit State Agencies to determine with finality what constitutes "interstate commerce" as that term is used in the Interstate Commerce Act and to assess the scope of operations authorized by a federal agency would be to empower state governments to frustrate the purpose and intent of both the "supremacy clause" and "commerce clause" of the Constitution. One can easily anticipate the evils that would attend application of the Virginia definition of "interstate commerce" by 49 different state agencies. Would not differing state authorities make varying application of the vague, indefinite standard sponsored by the Commonwealth of Virginia? And would not the rule of constitutional construction established in *Martin* v. *Hunter's Lessee,* 1 Wheaton 304 be negated?

Petitioner does not contend that a state may not ever question the legality of the operations performed by a federally authorized motor carrier. It simply asserts that where, as in the instant controversy, the motor carrier is conducting operations in compliance with a federal order, the state must seek any relief to which it believes itself entitled from the Interstate Commerce Commission initially or on review in the Federal Courts.

Assuming, without conceding, that the State Corporation Commission, or any of the intrastate carriers which the Commission alleges that it is protecting, are actually aggrieved by any of the operations conducted

by petitioner, the appropriate forum to entertain the request for relief was the Interstate Commerce Commission. State commissions as well as other interested parties under the provisions of Section 204(c) and other sections of Part II of the Interstate Commerce Act may resort to the Interstate Commerce Commission for relief in instances where authorized carriers are alleged to be operating beyond the scope of their certificates. Additionally, the Administrative Procedure Act permits the Interstate Commerce Commission to issue declaratory orders interpreting certificates of public convenience and necessity issued by that Commission. In this connection it is significant to note that, although petitioner served a copy of its petition for declaratory order to the Interstate Commerce Commission on the State Corporation Commission the state agency chose not to submit to the jurisdiction of the Interstate Commerce Commission. That the Interstate Commerce Commission is the proper forum for determination of the issues presented here is made quite apparent in the *Castle Case,* supra, where this Court observed, 348 U.S. 61, 65:

> "If therefore, motor carriers persistently and repeatedly violate the laws of a state, we know of no reason why the Commission may not protect the state's interest either on the Commission's own initiative or on complaint of the state."

Even more closely in point to the case at bar is *Andrew G. Nelson, Inc.* v. *Jessup, supra.* There, as here, the scope of operation permitted by the carrier's interstate certificate was questioned by state authorities. The Federal District Court enjoined state officials from interfering with the operations of the carrier until such time as the Interstate Commerce

Commission had made a determination of the operating rights of the carrier. As in the *Castle Case,* supra, the state authorities were advised that the proper forum to question the operations of the carrier was the Interstate Commerce Commission. The language of the Court merits direct quotation, page 229:

> "As indicated by the Supreme Court in the Castle case, if a state has a grievance against an interstate carrier its remedy lies under Section 204(c) of the Act * * * which provides for the filing of complaints 'to the Commission by any person, state, Board, organization or body politic.' And for the investigation and disposition of such complaints."

The Court also stated, page 228 that:

> "The construction of an interstate carrier's permit by state officials is untenable."

The Federal Court cases last cited express the principle employed by the Interstate Commerce Commission in the *Atlantic Freight Lines Case,* supra, when it interpreted its own order even after the meaning of the order had been the subject of extended litigation before the State Courts.

On the authority of the cases cited, it must be concluded that the Corporation Commission, if entitled to any relief, was required to seek a remedy from the Interstate Commerce Commission.

CONCLUSION

Petitioner prays that this Court (1) reverse the action of the Supreme Court of Appeals of Virginia and issue a mandate directing that Court to instruct the Virginia State Corporation Commission to vacate the

latter's order requiring petitioner to pay fines in the amount of $3,500.00 and (2) grant such further relief as is just in the circumstances.

Respectfully submitted,

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Dated: January 5, 1959

SUPREME COURT, U. S.
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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 92

SERVICE STORAGE AND TRANSFER CO., INC., *Petitioner*

v.

COMMONWEALTH OF VIRGINIA, *Respondent*

On Writ of Certiorari to the Supreme Court of Appeals of Virginia

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

PRELIMINARY STATEMENT

Petitioner, Service Storage and Transfer Co., Inc., submits this, its reply to the briefs filed on behalf of Respondent, the Commonwealth of Virginia and Amicus Curiae, The National Association of Railroad and Utilities Commissioners.

THE CONTENTIONS OF RESPONDENT AND AMICUS

The contentions of the Respondent and those of Amicus Curiae, in all essential respects are identical and the relevant propositions asserted by either or both may be briefly summarized as follows:

(a) That the questioned operations of petitioner involving, as they do on some occasions, the using of circuitous routes through a sister state constitute a subterfuge and an evasion of state law.

(b) That the questioned operations involve shipments moving between points in Virginia that could have moved over more direct highways wholly located in Virginia and that the transportation is therefore intrastate and subject to state regulation.

(c) That neither petitioner's interstate certificate nor the report of the Interstate Commerce Commission in *Service Storage and Transfer, Inc.—Petition for Declaratory Order,* 71 M.C.C. 304, interpreting petitioner's certificate authorize the questioned operations.

(d) That state authorities may with finality determine whether a motor carrier's operations are interstate in character.

(e) That the provisions of section 202(b) and section 216 (e) of Part II of the Interstate Commerce Act reserve to the several states jurisdiction over the operations of the type in question.

(f) That even if the questioned operations are in fact interstate, that the Commonwealth of Virginia should be permitted to assume jurisdiction over them because of their "local character" in order to enable the state to protect "intrastate haulers" and "the public in Virginia".

ARGUMENT IN REPLY

Reply to propositions (a) and (b)

(1) The Questioned Operations Are Bona Fide and the Circuity in Highway Mileage is Immaterial

Contrary to the position assumed by the Commonwealth of Virginia and the National Association of Railroad and Utilities Commissions, there is really no question as to whether shipments moving from Virginia origins to Virginia destinations through Bluefield, West Virginia, are in fact interstate in character. Both the definition of interstate commerce, as that term is used in Section 203 (10) of Part II of the Interstate Commerce Act, and the decisions of this Court, foreclose argument on that point. As Justice Frankfurter stated in *Central Greyhound* v. *Mealy*, 334 U.S. 653, 655:

> "It is too late in the day to deny that transportation which leaves a state and enters another state is 'commerce . . . among the several states' simply because the points from and to are in the same state".

citing, *Hanley* v. *Kansas S.R. Co.*, 187 U.S. 617 and *Western Union Telegraph Co.* v. *Speight*, 254 U.S. 17. The question then is whether petitioner's interstate operations between points in Virginia are performed in such a way as to compel the conclusion that although interstate as a matter of fact they should be held to be intrastate as a matter of law. Petitioner has consistently contended throughout the course of this litigation that its interstate certificate as construed by the Interstate Commerce Commission disposes of the latter issue. The Interstate Commerce Commission's report interpreting petitioner's certificate forecloses inquiry by the state on the issue at this time because it has

been established as a matter of law, that the questioned operations are bona fide and authorized by the carrier's certificate.

Even assuming, however, that state authorities may through the institution of proceedings in its own forums, collaterally attack an order of a Federal agency, and assuming that a state is entitled to test the bona fides of a Federally certificated motor carrier's operations, the record evidence in this proceeding does NOT permit the inference that petitioner's operations have been conducted in bad faith.

Petitioner agrees with Amicus that there is not "any dispute concerning the facts in the case". Petitioner, however, asserts that many significant, uncontradicted, evidentiary facts have been ignored both by respondent and amicus in the formulation of their arguments. In the Commonwealth's attempt to distinguish *Western Union Telegraph* v. *Speight*, 254 U.S. 17 (respondent's brief, page 13) it argues that factual differences render that decision inapposite here. The Commonwealth points out, for example, that in the case cited the arrangements developed by Western Union to transmit messages between North Carolina points through Richmond, Virginia had been in existence for many years and that the operational plan followed by the telegraph company was operationally more convenient and more economical. In its attempt to distinguish factually the *Western Union* case, the Commonwealth fails to take into consideration the uncontradicted testimony of the only witness that presented evidence with respect to the physical operations performed by petitioner in moving traffic between Virginia points. For example, it completely ignored the following testimony (R. 42-43):

Q. Will you state, Mr. Echard, as it relates to your operations, what effect, if any, does circuity in the operation, some excess mileage, as reflected in the exhibit, what effect that has on the feasibility or practicability and profitability of your company's operations.

A. Even though we could take a more direct route if we were going to move a shipment from one point to another point, the feasibility of it is to move freight into the "break bulk point" and fan out from that point the freight going to other areas, combining freight from Charleston, Covington, Beckley, and Roanoke at Bluefield and moving it into the Bristol terminal for handling there.

Q. In other words, do I understand your testimony to mean that, because there is a volume of less truckload traffic, you can handle other shipments without making your shipments unprofitable or impractical?

A. Yes. If you could move it down 11 from Roanoke to Bristol, which we can't do legally, but if we could, so far as our operation is concerned, it would give better service to move it through Bluefield because of the flow of freight.

Q. What do you mean by "flow of freight"? Do you mean the flow of freight from Bluefield?

A. We have 4,000 pounds from Roanoke to Bristol, for example, and we move that 4,000 pounds with other freight in trailer loads to points west and southwest to Bluefield, and when you get to Bluefield that 4,000 pounds will move in conjunction with other freight we combined to Bristol in truckloads.

Q. And if it were to move directly from Roanoke to Bristol, it would move simply as a 4,000 pound shipment?

A. It would move as a 4,000 pound shipment, or you could not move it until you had another shipment, which would delay the shipment.

Q. There would not be enough traffic to justify the operation?

A. That is my view.

Ignored also is the fact that the questioned operations were performed for a period of more than four years in precisely the same manner that they were conducted at the time that the Virginia authorities instituted prosecution (R. 39).

The situation as described by Witness Echard shows that petitioner here, like the telegraph company in *Western Union* v. *Speight*, had not only conducted the questioned operations for many years, but in addition showed by uncontradicted evidence that the method of handling the traffic in question was more convenient and less expensive for the company.

Other important facts supported by the record, but ignored by Respondent and Amicus, include the following:

1. That the shipments moving between Virginia points were transported in the same vehicle used to transport traffic moving between Virginia and West Virginia. (R. 37-38)

2. The circuity in operation between Virginia origins also exists in operations conducted between Virginia and West Virginia (Exhibit 5—R. 105).

3. That patrons of petitioner's service know that the service was performed through another state. (R. 70)

As Exhibit 5 demonstrates, circuity in operation is not unusual in petitioner's other interstate operations nor is it unusual in the transportation industry generally whether the mode of transportation be rail,

water, air or motor. The feasibility, practicability or profitability of a transportation business is not tested by the layman's standard employed by respondent but rather by whether "the flow of freight" (R. 42) requires handling pursuant to a convenient, efficient and economical plan devised by the transportation company.

Respondent has failed to distinguish *Western Union* v. *Speight* which we consider controlling on the issue of bona fides. More significantly, it has ignored completely other telegraph cases, including those of its own highest court, the Supreme Court of Appeals of Virginia.

In *Western Union Telegraph* v. *Bowles,* 124 Va. 730, the transmission of a telegraph message from Bassett, Virginia to Martinsville, Virginia, through North Carolina points was held to be interstate precisely for the reason urged here by petitioner. That transaction was described by the Virginia Supreme Court of Appeals as follows (732):

> "Following the method then, and for some years theretofore, in the regular use by the Company, this message was forwarded from Bassett to Richmond over a direct wire but passes through two telegraph offices in North Carolina before it reaches Richmond, the relay point for messages coming into the territory in which Martinsville is situated. This wire passes through the Martinsville office, but is not designed for direct use there. From Richmond, the message, like all others of its class, was sent over another direct wire, which run through two other North Carolina offices before reaching Martinsville. The agent at Bassett testified that the messages could have been sent direct to Martinsville, but that the route by which he did send it was the one which afforded the quickest service to patrons, and was the one in

regular use under the practice and requirements of the company. This testimony is not in any way disputed or contradicted."

The Supreme Court of Appeals of Virginia also stated (733):

> "That the interstate character of the message must be tested by the actual facts as to its transmission and not by the motives of the company" * * * and that "the adoption by the company of an interstate route of transmission relegated the transaction to the domain of federal control".

Recognizing the danger of a lay approach to operations conducted by a telegraph company, the Court later stated (734):

> "If only the patrons of the company at Bassett and Martinsville were concerned, there would seem to be little doubt, certainly to a mind unfamiliar with the art of telegraphy and untrained in its practical use, that the best and quickest way to serve these two points would be by the use of a direct instead of a circuitous line. But the company serves a vast territory and a multitude of patrons, and in doing so maintains a large organization and a complex system, which it is by law required to so direct and control as to best and most efficiently serve the general public. If it is failing in its duty in this respect as to messages of the kind here involved, the question is one with which (whether unfortunately or not) the State cannot deal for the reasons already set out."

Reply to Proposition (c)

(2) Petitioner's Certificate and the Declaratory Order of the Interstate Commerce Commission Specifically Authorize the Questioned Operations

Both respondent and amicus contend that petitioner's certificate does not authorize the operation in question. They also contend that the *declaratory report* issued by the Interstate Commerce Commission interpreting petitioner's certificate does not in fact authorize petitioner to conduct the operations in question. They criticize petitioner for resorting to the Interstate Commerce Commission after proceedings had been instituted by and hearing held before the Virginia State Corporation Commission. The fact is that petitioner appealed to the Interstate Commerce Commission for a definitive interpretation of its certificate because, during the course of hearing before the Virginia Commission, it was made clear by members of that Commission that they were unwilling to accept either the informal interpretation of that certificate issued by the Interstate Commerce Commission's field staff and/or its Director of the Bureau of Motor Carriers and were also unwilling to accept the rule of decision expressed by the Interstate Commerce Commission in *Atlantic Freight Lines, Inc.—Interpretation of Certificate,* 51 M.C.C. 175. Although Amicus also suggests that the Interstate Commerce Commission's declaratory report was issued "solely upon the allegations submitted by the Petitioner" it fails to recognize that a copy of that petition was served on appropriate state officials and that upon receipt thereof, the state could have become a party, requested hearing and assumedly introduced evidence in support of its position.

Both respondent and amicus fail to include in their briefs any reference to or discussion of *Atlantic Freight Lines, supra,* although petitioner throughout the course of this litigation has relied heavily, not only on the decision reached therein, but the complete illumination of the problem and the rationale supporting the Commission's ultimate conclusions. Curiously enough, respondent refers this Court to *Atlantic Freight Lines* v. *Pennsylvania P.U.C.,* 60 Atl. 2nd 589, wherein it was held by the Pennsylvania court that operations conducted between Pennsylvania points through Baltimore, Maryland were not interstate. Had respondent traced the history of that proceeding to its conclusion and considered it in the light of *Atlantic Freight Lines, Inc.—Interpretation of Certificate, supra,* it would have found that the Pennsylvania P.U.C. participated in latter case before the I.C.C. and that subsequent to the Interstate Commerce Commission's definitive interpretation of the certificate of Atlantic Freight Lines, Inc., Pennsylvania officials subscribed to the Interstate Commerce Commission's interpretation and entered into a stipulated agreement, the result of which now permits Atlantic Freight Lines to conduct operations between points in Pennsylvania so long as the transportation is performed over an interstate route of movement and in accordance with the carrier's interstate certificate. Attached hereto as an appendix there is a copy of that stipulation.

Petitioner further asserts that respondent may not in a proceeding of this character attack collaterally petitioner's interstate certificate nor, may it criticize or attempt to interpret the Federal agency's declaratory order, particularly since after appropriate invitation it chose not to become a party to the proceeding leading the issuance of the interpretation report.

Reply to Proposition (d)

(3) State Authorities May Interpret Orders of Federal Agencies But That Action is Necessarily Reviewable in Federal Forums

The Commonwealth of Virginia rejects Petitioner's suggestion that it would have been more appropriate for the state authorities to invoke the jurisdiction of the Interstate Commerce Commission under the provisions of Section 204 (c) of Part II of the Interstate Commerce Act. Petitioner has never contended that the states are compelled so to do but in the light of this Court's decision in *Castle* v. *Hayes Freight Lines,* 348 U.S. 61, it is now clear that where concurrent jurisdiction may exist, the sound approach is through the Federal forum. The testing of federal orders in state forums necessarily involves the risk of invalidating a federal order through collateral attack. On this point, we may properly resort to the opinion of the Interstate Commerce Commission in *Atlantic Freight Lines, Inc.—Interpretation of Certificate, supra,* the Commission there stated:

> "* * * that primary jurisdiction to determine the bona fides of interstate transportation is vested in this Commission." 51 MCC 186.

As authority for its action the Interstate Commerce Commission referred to the opinion of the Superior Court of Pennsylvania in *Atlantic Freight Lines, Inc.* v. *Pennsylvania Public Utilities Commission, supra,* wherein it was held:

> "That the question of what is interstate commerce is one of fact; that since enactment of the Motor Carrier Act of 1935, the conclusive determination of that fact is vested in this Commission; that when this Commission has determined that

certain transportation is bona fide interstate transportation, no state commission or court may thereafter collaterally attack such finding in another proceeding; but, where this Commission has not determined the question, the State Commission or court must use its best judgment in initially doing so." 51 MCC 178.

Had the Commonwealth of Virginia resorted to the federal commission in the first instance or later intervened in the declaratory order proceeding, this Court would have before it a proceeding involving direct review of an Interstate Commerce Commission order instead of review of that same order through collateral attack. Petitioner contends that this Court should insist that attacks on Interstate Commerce Commission orders be limited to the procedure prescribed in Title 28, U. S. Code Sections 1336, 2321-2325, and 2284. *Texas and P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 553.

Reply to Propositions (e) and (f)

(4) Assuming, Arguendo, That the Operations in Question Have Local Aspects, Neither the Interstate Commerce Act Nor Other Authority Permit Their Control and Regulation by the Commonwealth of Virginia

The operations in question of petitioner are by definition, fact and law interstate commerce. However, even accepting the premise advanced by respondent and amicus curiae, that such operations involve "local" or intrastate aspects, there is no statutory or other authority which permits their regulation by a state instrumentality.

In support of the position that petitioner's operations are so local in nature as to require state regulation, respondent and amicus curiae rely on the language

of sections 202(b) and 216(e) of Part II of the Act. Section 202(b) limits the Act to operations in interstate commerce, while a proviso of section 216(e) bars the Commission from regulating intrastate transportation as to rates, fares, charges or service in connection therewith. The provisions of the sections referred to relate to intrastate commerce only. Here, petitioner's operations, as stated earlier, are in interstate commerce both by statutory definition and by virtue of an Interstate Commerce Commission order. Therefore, it follows that both section 202(b) and section 216(e) are wholly inapplicable. This same point was raised in *United States* v. *Capital Transit Co.*, 325 U.S. 357 (1945) and again in *United States* v. *Capital Transit Co.*, 338 U.S. 286 (1949). In the former case, Capital Transit in seeking to avoid rate regulation of its District of Columbia-Virginia service by the Interstate Commerce Commission, contended that Commission jurisdiction was precluded by the exemption in section 216(e). After holding that the service involved was "interstate transportation" the Court found that the exemption in section 216(e) was expressly made inapplicable.

The second *Capital Transit* case contains even more conclusive authority for the rejection of respondent's "intrastate aspects" contention. For there, the parties (including the Commonwealth of Virginia) that opposed federal jurisdiction relied, inter alia, upon *Connecticut Light and Power Co.* v. *Federal Power Commission*, 324 U.S. 515, and *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 907, just as respondent and amicus curiae do. The inapplicability of *Connecticut Light* and *Panhandle* to the facts in the case at bar seems manifest because this

Court's opinion in the second *Capital Transit* case does not make even fleeting reference to them.

One additional point raised by Amicus requires comment. In pressing its "local aspects", ergo, "local control" argument, Amicus (at page 13 of its brief) gratuitously infers in the complete absence of record evidence, that the action of the Commonwealth would "protect" or otherwise benefit "intrastate haulers" and the "Virginia shipping public". Had there existed intrastate haulers in the territory and had they suffered injury, the Commonwealth of Virginia had it within its power to introduce evidence thereon. Had the shipping public of Virginia been prejudiced by petitioner's operations, evidence thereof was not adduced and it is wholly improper to indulge in such presumption. If the evidence in this case permits any inference on the matter, it is that the shipping public of Virginia has used voluntarily petitioner's service, knowing it to be provided over sometimes circuitous routes. Their past continued use of that service implies a continuing need therefor and strongly suggests the non-availability of adequate intrastate motor carrier service. If petitioner's weekly revenues of approximately $500 (Exhibits 7 & 8—R. 106-107) is important to the continued economic health of the alleged but unidentified intrastate haulers, it appears that they could easily capture the traffic involved by providing the "quicker service" that this Court is asked to assume could be provided over the "normal, regular, or usual route".

Congress in permitting interstate carriers to perform services between two points in the same state through a sister state after the carrier obtained authority from the Interstate Commerce Commission was not unmind-

ful of the effect on local haulers. Accordingly it provided in the second proviso of Section 206(a)(1) that intrastate carriers authorized by state officials to conduct intrastate operations would be permitted to obtain automatically from the Interstate Commerce Commission co-extensive interstate authority. That provision it seems to us strikes an equitable balance between interstate carriers and intrastate carriers.

CONCLUSION

Petitioner submits that the arguments advanced by respondent and amicus are untenable and that accordingly the relief requested by petitioner in its opening brief should be granted.

Respectfully submitted

FRANCIS W. MCINERNY
1625 K Street, N. W.
Washington 6, D. C.

Attorney for Petitioner

Of Counsel:

MACLEAY, LYNCH & MACDONALD
Washington, D. C.

APPENDIX

C. P. Dauphin County

Equity Docket No. 2008

C. D. No. 267

PENNSYLVANIA PUBLIC UTILITY COMMISSION

v.

ATLANTIC FREIGHT LINES, INC.

STIPULATION

AND Now, this 27th day of July, A. D., 1955, it is hereby stipulated and agreed by and between the parties to the above styled cause that the Court shall and may enter the following decree.

(s) HARRIS LATTA
(s) JOSEPH NISSLEY
Attorney for Atlantic Freight Lines

C. P. Dauphin County

Equity Docket No. 2008

C. D. No. 267

PENNSYLVANIA PUBLIC UTILITY COMMISSION

v.

ATLANTIC FREIGHT LINES, INC.

DECREE

AND Now, this 27th day of July, 1955, upon the consent of the parties to the above styled cause, and upon consideration of the pleadings filed and proceedings heretofore had therein, the plaintiff having exhibited its complaint, as

amended, asking relief touching the matters therein particular complained of and set forth at length, and preliminary objections to the complaint having been determined, and answer having been filed by defendant, and the parties, including intervenors, having agreed that the matter shall be disposed of by the entry of a consent decree.

NOW THEREFORE, IT IS ORDERED, ADJUDGED, DECREED AND FINALLY DETERMINED that defendant, Atlantic Freight Lines, Inc., be, and hereby is, enjoined from transporting freight, as a common carrier by motor vehicle, or otherwise, between points in Pennsylvania, except such transportation in interstate commerce as may be authorized by operating authority from the Interstate Commerce Commission and which in fact moves over an interstate route of movement; it being the intent of this decree to prohibit absolutely any transportation of freight by defendant between points in Pennsylvania in intrastate commerce over a route of movement lying wholly within the Commonwealth of Pennsylvania, but to impose no restriction whatsoever upon defendant with respect to transportation in interstate commerce between points in Pennsylvania which defendant is authorized to serve by operating authority from the Interstate Commerce Commission and which transportation in fact moves over a route of movement so authorized by the Interstate Commerce Commission and lying partly within and partly without the Commonwealth of Pennsylvania.

(s) WALTER R. SOHN
J.

We consent to the entry of the foregoing decree.

(s) HARRIS LATTA
(s) JOSEPH NISSLEY
Attorney for Atlantic Freight Lines

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SUPREME COURT, U. S.

Office
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JOHN T. FEY, Clerk

In the

Supreme Court of the United States

October Term, 1958

No. 1058 92

SERVICE STORAGE AND TRANSFER CO., INC.,
Petitioner

v.

COMMONWEALTH OF VIRGINIA,
Respondent

Brief and Appendix on Behalf of Respondent in Opposition to the Petition for a Writ of Certiorari

A. S. HARRISON, JR.
Attorney General of Virginia

Supreme Court–State Library Building
Richmond, Virginia

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In the

Supreme Court of the United States

October Term, 1957

No. 1058

SERVICE STORAGE AND TRANSFER CO., INC.,
Petitioner

v.

COMMONWEALTH OF VIRGINIA,
Respondent

Brief on Behalf of Respondent in Opposition to the Petition for Writ of Certiorari

Respondent, believing that the matters set forth herein will demonstrate the lack of jurisdiction of this Court and, further, the lack of substance in the questions presented by this petition, files this brief in opposition to the petitioner's petition for writ of certiorari. The respondent includes the ground that the decision below was not rested on a federal question. The matters here relied upon are more particularly stated below.

STATEMENT OF THE CASE AND THE PROCEEDINGS BELOW

Service Storage and Transfer Company, Incorporated, hereinafter referred to as "Service" or "Petitioner" is a common carrier operating pursuant to the authority of certain certificates of convenience and necessity issued by the Interstate Commerce Commission. Service uses Bluefield,

West Virginia as a "gate way" to and from the Commonwealth of Virginia.

On September 19, 1956, the State Corporation Commission of Virginia issued a Rule (App. I) which reads, in part, as follows:

> "It appears to the Commission that Service Storage & Transfer Company, Incorporated, of Bluefield, West Virginia, was found to be hauling property in intrastate commerce without authority of the State Corporation Commission and in violation of Chapter 12, Title 56 of the Code of Virginia on the following occasions, to-wit:"

The above Rule was issued pursuant to the authority vested in the Corporation Commission by Section 56-304.12 (App. V). Thereafter a hearing was held by the Commission on November 29, 1956 and, on February 26, 1957, the Commission issued an order (App. II) finding that Service had transported property for hire between points in Virginia in intrastate commerce without the authority of the State Corporation Commission. On March 21, 1957, the Commission issued an opinion (App. III) in this matter. The opinion held that Service was guilty of operating as a common carrier by motor vehicle in intrastate commerce without a certificate of Convenience and Necessity from the Corporation Commission in violation of Section 56-278 (App. VI) of the Code of Virginia. Service was fined $500.00 for each of ten violations. This case was then appealed to the Supreme Court of Appeals of Virginia, which Court held that Service was in violation of Section 56-278 of the Code in seven of the ten instances in question and, therefore, affirmed in part and reversed in part the order of the Commission and directed the Commission to amend its order in conformity with the Court's opinion (App. IV). Service

was, therefore, fined $3500.00 for shipping goods by way of Bluefield, West Virginia in the following seven instances:

Origin	*Destination*
Bluefield, Virginia	Haysi, Virginia
Roanoke, Virginia	Glen Lyn, Virginia
Lynchburg, Virginia	Draper, Virginia
Roanoke, Virginia	Wytheville, Virginia
Bristol, Virginia	Carbo, Virginia
Bristol, Virginia	Cranes Nest, Virginia
Bristol, Virginia	Wise, Virginia

The printed record contains the testimony of the investigators of the Division of Motor Transportation of the State Corporation Commission who stopped certain trucks owned and operated by the petitioner on Virginia highways. The investigators found that these vehicles were carrying goods from one point in Virginia to another point in Virginia without a certificate of convenience and necessity from the State Corporation Commission. It was stipulated at the hearing that all shipments in question were routed through Bluefield, West Virginia (R. 22). It is apparent from the evidence that the usual or normal route between two such points in Virginia was not followed by the petitioner. It is clearly shown by the evidence that the routes followed were in fact unnecessarily long and circuitous and were not the routes that the ordinary prudent man would use. An examination of a map of a portion of Virginia and West Virginia (R. Ex. 1) shows that, in one instance, a shipment moved 90 miles more than necessary had the most direct route been followed. The simplest example is presented by the shipment from Roanoke to Wytheville, which went to Bluefield, West Virginia and thence to Wytheville instead of moving directly down U. S. Route 11.

Had the petitioner moved the shipment in question by a

route which a reasonably prudent man would follow, the shipment would never have left the territorial boundaries of Virginia. The petitioner admits that there are instances when the shipment of goods between two Virginia points through Bluefield, West Virginia is not interstate commerce:

> "I don't know whether Mr. Siebert has been advised of this or not, that since the issuance of the last rule, many questionable operations were terminated, and, by reason of the delay involved to some of the shippers and consignees, we had to make adjustments, and some have not been able to make adjustments, to replace the carrier service afforded by respondent; and they have submitted charges to Mr. Seibert that there is nothing available for them to do and that they know there is interstate commerce through Bluefield and through Bluefield, West Virginia, and the billings are on interstate commerce billings, governed by interstate tariffs, and I feel confident everything I have said is factually accurate."

The petitioner does not hold a certificate of convenience and necessity from the State Corporation Commission of Virginia. It had been fined before for a similar violation and did not appeal the decision of the Commission (R. 72-73) (App. III). It is manifest that the petitioner employed the unusual and circuitous routes in an attempt to evade the jurisdiction of the State Corporation Commission of Virginia. The Supreme Court of Appeals held that the Corporation Commission had properly fined Service in seven of the ten instances and the fine was, therefore, reduced to $3500.00.

QUESTIONS PRESENTED

The petitioner contends that the State Corporation Commission of Virginia is not vested with the authority or juris-

diction to make a factual determination in this case. Three specific questions are raised by the allegations in the petitioner's brief:

> "(1) Whether a state agency lawfully may impose criminal sanctions on a motor common carrier for conducting interstate operations in accordance with the carrier's interstate certificate of public convenience and necessity as construed by the Interstate Commerce Commission?
>
> "(2) Whether the enforcement of a state statute in a manner which requires discontinuance of motor carrier operations authorized by order of the Interstate Commerce Commission is in conflict with Part II of the Interstate Commerce Act and in contravention of the 'Commerce clause' of Article I, Section 8 of the Federal Constitution.
>
> "(3) Whether a state agency which desires a certificated interstate motor carrier to discontinue allegedly unlawful operations must seek relief from the Interstate Commerce Commission as provided in Section 204(c) of Part II of the Interstate Commerce Act."

ARGUMENT

The Decision of the Supreme Court of Appeals of Virginia Rested on Non-Federal Ground; Therefore, This Honorable Court Does Not Have Jurisdiction to Hear This Case.

The three questions presented by the Petitioner are somewhat overlapping and, therefore, we find it expedient to answer them as one. The sole question now before this Court involves a factual determination made by the State Corporation Commission (hereafter called the Commission) and affirmed by the Supreme Court of Appeals of Virginia (hereafter called the Court). The Commission's decision was rendered on February 26, 1957, and the Report of the I. C. C. on Petition (by Division 1) was handed down on

March 29, 1957, and was, therefore, not before the Commission when this case was decided. This Report of the I. C. C., Division 1 reads, in part, as follows:

> *"In the absence of any showing that petitioner's use of its authorized route is a subterfuge to avoid State regulation, or other than a logical and normal operation through the carrier's headquarters we are of the opinion that petitioner's operations, in the manner described, constitute bona fide transportation in interstate commerce.* This conclusion finds support in the fact that the routes employed between Virginia points are not unduly circuitous or impracticable but on the contrary are such as might normally be used by any carrier authorized to operate between the Virginia points involved, and that Bluefield, W. Va. is petitioner's headquarters and the base of other substantial operations to and from points in Virginia of which the operations challenged are only a small part." (Italics supplied)

The italicized language is pertinent herein. The Report shows on its face that a determination was reached as to the authority of the petitioner to operate under certain I. C. C. certificates. It is manifest that this Report was based on an assumption that the petitioner's use of such routes was not "* * * a subterfuge to avoid State regulation, or other than a logical or normal operation * * *." In the case now before this Court a factual determination has been made that the petitioner has in fact used these illogical and abnormal routes as a subterfuge to avoid State regulation. There is, however, no conflict between the opinion of the State Corporation Commission and the Report of the Interstate Commerce Commision. The State authorities have found that Service has attempted to evade State laws. The I. C. C. has determined that Service may use these routes when their operations are normal, logical and not in an

attempt to evade State laws. Service was not fined for moving these shipments in interstate commerce, but was penalized for carrying intrastate shipments without a Virginia certificate of convenience and necessity. It must, therefore, be concluded that there is no difference of opinion in this matter between the Interstate Commerce Commission and the State Corporation Commission. Both of these agencies have determined that Service may not use these I. C. C. certificates in an attempt to avoid State regulations.

The following language from the Court's opinion is pertinent:

> "An examination of the evidence which includes the map exhibits of Virginia and West Virginia clearly shows that the 'normal or usual' routes were not followed between the Virginia points involved. On the contrary, the shipments were hauled miles out of the way, over circuitous routes, in order to accomplish the purpose sought."

The Court therefore concluded that the long and circuitous routes employed by Service were not bona fide and were used as a subterfuge to avoid State regulations. The following reasoning employed in *Eichholz* v. *Public Service Commission*, 306 U. S. 268, 83 L. ed 641, 646, 59 S. Ct. 532 is applicable here:

> "'Appellant insists that the hauling from St. Louis over the state line to Kansas City, Kansas, of merchandise consigned to persons in Kansas City, Missouri, and hauling it back again to its intended destination in Kansas City, Missouri, was actually interstate transportation. * * * That fact, however, does not require the conclusion that the State's action for the protection of its intrastate commerce was invalid. See Lone Star Gas Co. v. Texas, 304 U. S. 224, 238, 82 L. ed. 1304,

1314, 58 S. Ct. 883. We may assume that Congress could regulate interstate transportation of the sort here in question, whatever the motive of those engaging in it. But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected. * * * If appellant's hauling of the merchandise in question across the State line was not in good faith but was a mere subterfuge to evade the State's requirement as to intrastate commerce, there is no ground for saying that the prohibition of the use of the interstate permit to cover such transactions, and the application of the Commission's rule prohibiting them in the absence of an intrastate certificate, was an unwarrantable intrusion into the federal field or the subjection of interstate commerce to any unlawful restraint. * * *.'"

This language from *Eastern Carrier Corporation* v. *U. S.*, 31 F. Supp, 232, 236, is also pertinent to this inquiry:

"'* * * Thus it may not be concluded that because a carrier transports merchandise across a state line in order to evade the orders of a state public service commission, it has thereby engaged in bona fide interstate commerce serving public convenience and necessity. Upon the contrary, the purpose which the carrier has served by such operation is a purely private purpose, the evasion of the laws of a state.'"

An examination of the Division 1 Report in the declaratory judgment proceeding reveals that these two cases were not considered. Indeed, no mention was made of them. The question then resolves itself to a determination of the good faith of petitioner.

The Court found that the routes employed by Service were not used in good faith.

Division 5 in the case of *Slagle Contract Carrier Application* 2 M. C. C. 127 discussed the term "bona fide," and the following language found at page 141 is applicable here:

> "The Latin words 'bona fide' mean 'in good faith,' Webster's New International Dictionary defines 'bona fide' as 'in or with good faith; without fraud or deceit; real or really; actual or actually; genuine or genuinely.' As defined in Black's Law Dictionary, the words mean 'in or with good faith; honestly, openly, and sincerely; without deceit or fraud.' The Supreme Court in *Ware* v. *Hylton,* 3 U. S. 199, 241, defined them as follows:
>
> "Bona fide is a legal technical expression; and the law of Great Britain and this country has annexed a certain idea to it. It is a term used in statutes in England, and in acts of Assembly of all the States, and signifies a thing done really, with a good faith, without fraud or deceit, or collusion, or trust." (2 M. C. C. 141-2)

It is manifest that there is no showing of good faith on the part of Service. The sole conclusion that can be reached is that these unnecessarily long routes were employed in an attempt to evade the laws of Virginia. Petitioner cites the case of *Roundtree* v. *Terrell,* 22 F. Supp. 297. The following language from that case is applicable here:

> "True it is that commerce is undoubtedly traffic plus intercourse, and the carriage of freight and passengers between two points in one state, during which route there is passage over the soil of another state, will not render that business foreign, which is domestic." (22 F. Supp. 300)

See also *Clark* v. *Public Service Commission,* 120 Atl. 2d 363.

It is suggested further by the petitioner that he will have to cease certain interstate operations. An examination of the Commission's opinion and the Court's ruling does not reveal this to be so. The Commission did not order Service to cease interstate operations. It merely fined Service for operating in intrastate commerce without a certificate of convenience and necessity. The Commission has raised no objection relative to the bona fide interstate operations engaged in by Service. The sole matters considered by the Commission relate to intrastate movements between two Virginia points which could be reached more reasonably by a direct route lying wholly within this State.

Service contends also that Section 49 U. S. C. 304(c) requires the Commission to petition the Interstate Commerce Commission for relief in this matter. This is manifestly an erroneous intepretation of the language in question. This section is not mandatory, nor does it remove from the jurisdiction of the Commission the power to regulate commerce within its borders. The shipments were purely intrastate in character, in that the direct routes between the points of origin and destination lay wholly within Virginia. The business was local in character. Therefore, the Commission is vested with the authority to regulate it. *Panhandle Eastern Pipe Line Company* v. *Michigan Public Service Commission*, 341 U. S. 329, 95 L. ed. 993. This Court said in the case of *Illinois Central Railroad Company* v. *DeFuentes*, 236 S. Ct. 157, 59 L. ed. 517, 520:

> "Problems relating alone to commerce wholly within the State must be left to the discretion of the State Commission, to be exercised upon a view of all existing, relevant facts and circumstances."

This case, therefore, is clearly distinguished from *Castle*

v. *Hayes Freight Lines*, 348 U. S. 61, in that there has been no attempt to prevent the petitioner's using the highways of Virginia for interstate commerce.

The definition of the term "interstate commerce" is found in Section 49 U. S. C. 303(10). The petitioner suggests that the Commission has attempted to change this definition. We suggest that this interpretation of the Commission's decision is incorrect. The Commission found in this case an attempt to escape State regulation by driving, in one instance 155 miles through mountains instead of 81 miles down a valley. A suggestion that such movements are in fact interstate in character is clearly without foundation.

The respondent respectfully submits that the factual determination made below is amply supported by the evidence and, therefore, there is no question involving the Interstate Commerce Act of Article 1, Section 8 of the U. S. Constitution. The respondent prays that this Honorable Court will dismiss the petition on the ground that the decision of the State courts below were based on a non-federal ground.

CONCLUSION

Wherefore, the respondent respectfully submits that, for the reasons stated, this Court does not have jurisdiction to review the decisions of the State courts below, since their decisions rest solely upon a non-federal ground, there being no federal question involved, and the respondent respectfully moves the Court to dismiss the petitioner's petition for a writ of certiorari.

Respectfully submitted,

A. S. HARRISON, JR.
Attorney General of Virginia

Supreme Court–State Library Building
Richmond, Virginia

APPENDIX I

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

City of Richmond, September 19, 1956

Case No. 13182

COMMONWEALTH OF VIRGINIA, at the relation of the STATE CORPORATION COMMISSION

v.

SERVICE STORAGE & TRANSFER COMPANY, INCORPORATED

RULE

It appears to the Commission that Service Storage & Transfer Company, Incorporated, of Bluefield, West Virginia, was found to be hauling property in intrastate commerce without authority of the State Corporation Commission and in violation of Chapter 12, Title 56 of the Code of Virginia on the following occasions, to-wit:

August 21, 1956, U. S. Highway No. 460, one mile north of Pearisburg, Virginia, White tractor, Registration Card 18807, West Virginia license K-3345, shipment portable air compressor from Rish Equipment Company, Roanoke, Virginia, to Heron Todd Steel Construction Company, Incorporated, Glen Lyn, Virginia.

August 22, 1956, U. S. Highway No. 460, one mile north of Pearisburg, Virginia, no registration, no identification marker, International truck, West Virginia license K-3329, shipment of cotton work clothing from Norfolk and Western

Industries, Incorporated, Lynchburg, Virginia, to Sutphin & Jackson, Draper, Virginia.

September 6, 1956, U. S. Highway No. 460, one mile north of Pearisburg, Virginia, Registration Card 18798, White tractor, West Virginia license K-3337, shipment TV picture tubes, Leonard Electronics of Roanoke, Incorporated, Roanoke, Virginia, to Wytheville Vance Company, Wytheville, Virginia; kitchen cabinet sinks and parts, Roanoke Wholesalers, Incorporated, Roanoke, Virginia, to Buchanan Furniture Company, Coeburn, Virginia; kitchen cabinet sink and parts, Roanoke Wholesalers, Incorporated, Roanoke, Virginia, to Clinchfield Coal Corporation, Coeburn, Virginia; kitchen cabinet and parts, Roanoke Wholesalers, Incorporated, Roanoke, Virginia, to Electric Appliance Company, Big Stone Gap, Virginia, and motor parts from Southwest Motor Parts Corporation, Roanoke, Virginia, to Oakwood Motor Company, Oakwood, Virginia.

September 11, 1956, U. S. Highway No. 58, near St. Paul, Virginia, Registration Card not shown, Assigned Number VCC-208, White tractor, West Virginia license 3341, shipment cotton goods from F. D. Lazenby & Company, Bluefield, Virginia, to Haysi Hardware & Furniture Company, Haysi, Virginia, and shipment steel plates, Bristol Steel & Iron Works, Incorporated, Bristol, Virginia, to Link Belt Company, Carbo, Virginia.

September 17, 1956, junction U. S. Highway 58 and 72 at Coeburn, Virginia, Exemption Card E-194, Classification Plate same number, Virginia license T-220-690, International truck, shipment medicine, Miles Laboratories, Incorporated, Roanoke, Virginia, to Kilgore Grocery Company, Coeburn, Virginia; shipment iron railway car wheels, Enterprise Wheel & Car Corporation, Bristol, Virginia; to Banner Fuel Corporation, Cranes Nest, Virginia; shipment steel beams, Bristol Steel & Iron Works, Incorporated, Bristol, Virginia, to Quesenberry Construction Company,

Wise County Court House, Wise, Virginia and shipment medicine from Miles Laboratories, Incorporated, Roanoke, Virginia, to Coeburn Grocery Company, Coeburn, Virginia.

September 18, 1956, U. S. Highway No. 58, five miles west of Gate City, Virginia, Assigned Number E-194, Virginia license T-220-699, International truck, two shipments automobile supplies, Southwest Motor Parts Corporation, Roanoke, Virginia, to Kelly Motor Company, Big Stone Gap, Virginia. September 19, 1956, U. S. Highway No. 11, five miles west of Abingdon, Virginia, Assigned Number E-194, Virginia license T-220-690, International truck, shipment candy from Harris Woodson Company, Incorporated, Lynchburg, Virginia, to City Food Market, Coeburn, Virginia.

September 19, 1956, U. S. Highway No. 11, five miles west of Abingdon, Virginia, Assigned Number E-194, Virginia license T-220-697, International tractor, shipment TV set, Bluefield Hardware Company, Roanoke, Virginia, to Wise Hardware, Norton, Virginia.

A rule is hereby awarded, returnable at the court room of the State Corporation Commission in the State Office Building in the City of Richmond at 10:00 o'clock, a.m., on October 30, 1956, requiring Service Storage & Transfer Company, Incorporated, to appear and show cause, if any can be shown, why it should not be fined or otherwise penalized and why any and all authority issued to the said corporation should not be suspended or canceled as provided in Section 56-304.12 of the Virginia Code.

A copy of this rule shall be served on the Secretary of the Commonwealth and a copy shall be served on the agent of Service Storage & Transfer Company, Incorporated, at Roanoke, Virginia, and a copy sent by first class United States Mail to Service Storage & Transfer Company, Incorporated, Drawer 310, Bluefield, West Virginia.

APPENDIX II

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

City of Richmond, February 26, 1957

Case No. 13182

COMMONWEALTH OF VIRGINIA, at the relation of the STATE CORPORATION COMMISSION

v.

SERVICE STORAGE & TRANSFER COMPANY, INCORPORATED

On November 29, 1956, came on for hearing the rule issued against Service Storage & Transfer Company, Incorporated, for specified violations of Chapter 12, Title 56 of the Code of Virginia in transporting property for hire between points in Virginia in intrastate commerce without authority of the State Corporation Commission, Commissioners Hooker, King and Catterall sitting.

Francis W. McInerny and O. L. Shewmake appeared for the defendant. William C. Seibert appeared for the Commission.

The testimony shows and the defendant admits the transportation of property for compensation between the points in Virginia set forth in the rule.

From the following Virginia points of origin to the destinations shown, the only normal, regular or usual route is intrastate:

Origin	*Destination*
Bluefield, Virginia	Haysi, Virginia
Roanoke, Virginia	Glen Lyn, Virginia
Lynchburg, Virginia	Draper, Virginia
Roanoke, Virginia	Wytheville, Virginia
Bristol, Virginia	Carbo, Virginia
Bristol, Virginia	Cranes Nest, Virginia
Bristol, Virginia	Wise, Virginia
Lynchburg, Virginia	Marion, Virginia
Roanoke, Virginia	Kimbleton, Virginia
Roanoke, Virginia	Abingdon, Virginia

and the Commission finds that the transportation of goods from the above named origin points to the above named destination points in the State of Virginia is in violation of Chapter 12, Title 56 of the Code of Virginia; and it appearing that by order in Case No. 13074 the defendant was fined $25.00 for the transportation of property intrastate over the same or similar routes it is

Adjudged, Ordered and Decreed, That the defendant be fined $500.00 for each of the said violations, making a total of $5,000.00, together with the costs of this proceeding; and that a writ of fieri facias do issue in favor of the Commonwealth of Virginia against the defendant.

APPENDIX III

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

March 21, 1957

Case No. 13182

COMMONWEALTH OF VIRGINIA, at the relation of the STATE CORPORATION COMMISSION

v.

SERVICE STORAGE & TRANSFER COMPANY, INCORPORATED

Opinion, Catterall, Chairman.

This case is a prosecution of the defendant for operating as a common carrier by motor vehicle in intrastate commerce on the highways of Virginia without a certificate of public convenience and necessity in violation of § 56-278 of the Code of Virginia. The defendant holds certificates of public convenience and necessity issued by the Interstate Commerce Commission, but none from this Commission. There is no dispute as to the facts. The legal problem is where to draw the line between interstate and intrastate commerce. The defendant's I. C. C. certificates, of course, expressly limit the defendant's operations to interstate commerce. Notwithstanding the generality of the language in those certificates describing the geographical boundaries in which defendant may operate, the certificates contain a limiting clause to the effect that the holder of the certificate is granted authority:

"* * * to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle * * *"

Our inspectors discovered that the defendant was holding itself out as a common carrier to transport and was tranporting property for compensation between numerous points in Virginia. Accordingly a rule was issued under § 56-304.12 of the Code, which provides:

"The Commission may, by judgment entered after a hearing * * * if it be proved that the defendant * * * has violated any law of this State regulating the operation of motor vehicles for compensation on the highways of this State * * * impose a penalty, not exceeding one thousand dollars, which shall be collectible by the process of the Commission as provided by law."

Pursuant to the applicable provisions of the State Constitution the Commission, in cases of this kind, sits judicially as a court of record. The Commission fined the defendant $500 for each of ten specified violations of the law, making a total of $5,000 and costs; and issued a writ of fieri facias. Execution of the writ will be held in abeyance so long as defendant's petition for a writ of *supersedeas* is pending in the Supreme Court of Appeals.

The large size of the fine (one-half the maximum provided by law) is because in a prior case involving the same defendant, the same course of conduct and the same law, the Commission fined the defendant $25 for the purpose of settling the law of the case. The defendant paid the fine, did not take an appeal, and continued to operate in the same manner as before. Since $25 is all it costs to get a certificate of public convenience and necessity, it is manifest that the fine will have to be adjusted upward until it has a deterrent effect.

The prior case was Case No. 13074. It was heard on June 28, 1956, and final judgment was entered on July 9, 1956.

Our decision in that case is *res judicata* in this case. Pursuant to the authority conferred on it by § 155 of the Constitution, the Commission has adopted the following rule:

"15. *Res Judicata.* The doctrine of *res judicata* applies to final judgments, orders and decrees entered by the Commission sitting as a court of record. It does not apply in cases in which the Commission has a duty of continuous supervision or in any case in which a matter is reserved for further consideration."

The final order in that case is as follows:

"COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

City of Richmond, July 9, 1956

Case No. 13074

COMMONWEALTH OF VIRGINIA, at the relation of the
STATE CORPORATION COMMISSION

v.

SERVICE STORAGE & TRANSFER COMPANY,
INCORPORATED

On June 28, 1956, came on for hearing the rule awarded against Service Storage & Transfer Company, Incorporated, alleging the transportation of property in intrastate commerce without authority of the State Corporation Commission, Commissioners Hooker, King and Catterall sitting.

Francis W. McInerny appeared as counsel for the defendant. William C. Seibert appeared for the Commission.

It appearing to the Commission that from the evidence submitted the defendant did, as alleged in the rule of the

Commission of June 11, 1956, transport property in intrastate commerce without the authority of the State Corporation Commission in violation of Chapter 12, Title 56 of the Code of Virginia, of a fine of $25.00 and costs of the proceeding shall be assessed against the said defendant.

It Is, Therefore, Ordered:

(1) That Service Storage & Transfer Company, Incorporated, be, and it is hereby, fined the sum of $25.00 and costs of the proceeding.

(2) A copy of this order shall be sent to Francis W. McInerny, counsel for the defendant."

The Commission delivered the following opinion in that case:

"COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

July 9, 1956

Case No. 13074

COMMONWEALTH OF VIRGINIA, at the relation of the STATE CORPORATION COMMISSION

v.

SERVICE STORAGE & TRANSFER COMPANY, INCORPORATED

Opinion, Catterall, Commissioner.

This is a rule to show cause why the defendant should not be punished for operating intrastate in Virginia as a common carrier of property without a certificate of convenience and necessity from this Commission.

The defendant admits the facts alleged in the rule. Its

defense is that it can lawfully transport goods between Virginia points so long as it carries them out of the state and back again. It asserts, for example, the right to carry goods from Roanoke to Wytheville (which is 80 miles down Route 11), so long as it hauls them 160 miles around by Bluefield, W. Va.

Its federal certificate authorizes the defendant to engage in *interstate* commerce within 75 miles of Bluefield; the certificate specifies territory and not routes. If an I. C. C. certificate can and does grant the authority claimed by the defendant, the state commissions might as well go out of business.

The defendant relies on Atlantic Freight Lines, Inc., 51 M. C. C. 175 (1949) in which Division 5 of the Interstate Commerce Commission ruled that a movement from Pittsburgh to Philadelphia was interstate commerce if the movement goes by way of Baltimore.

Now there can be no doubt that a movement from a point in a state to another point in the same state is *sometimes* interstate commerce. The interesting question is whether the interstate character of the movement turns on whether *it is* an interstate movement or whether the I. C. C. *says* it is an interstate movement. Division 5 favors the latter view. In *Eichholz* v. *Missouri P. S. C.*, 306 U. S. 268, the Supreme Court upheld the authority of a state commission. Division 5 explained that the Supreme Court was able to render that decision only because Division 5 had not spoken. It said (p. 190):

"Thus, the situation presented in that case is dissimilar in a very material respect from that here present. There the State acted while the carrier's application for authority was still pending before us and before we had decided the matter and assumed jurisdiction over the interstate movement. Here the application has been finally adjudicated and

we have assumed jurisdiction. Accordingly, the *Eichholz* case is not authority for the proposition that the issue can be reopened and reviewed collaterally after we have finally determined the character of commerce to be interstate, have assumed jurisdiction, and have issued the certificate.'

If that declaration of the Interstate Commerce Commission is taken at its face value, that Commission could lawfully make a binding adjudication that transportation between Richmond and Petersburg was interstate. Of course that declaration is to be read in its context, and the I. C. C. would presumably admit that it could not, by its mere say so, transmute intra into interstate commerce.

When the actual physical movement of the vehicle crosses the state line and back again the question of whether it thereby escapes state regulation depends on whether the movement was '*bona fide*.' Whether the movement was *bona fide* cannot be permitted to depend on the carrier's state of mind. The test must be whether an ordinarily prudent carrier not restrained by regulation would use that route. The defendant drives 160 miles from Roanoke to Wytheville not because that is a sensible way to go but because it crosses the line into West Virginia. No *unregulated* carrier would do such a thing. Our conclusion is that when a carrier follows a circuitous route for the purpose of escaping state regulation he does not escape it. And we judge his purpose not by what he says his purpose is; but by what it appears to be from looking at a highway map.

In *Eichholz* v. *Public Service Commission*, 306 U. S. 268, 83 L. ed. 641 (1939) the carrier hauled freight from St. Louis, Missouri, to Kansas City, Missouri, through his terminal in Kansas City, Kansas, which was located less than half a mile from the Missouri line. In holding that the state commission had jurisdiction, the court said (p. 274):

"Appellant insists that the hauling from St. Louis over the state line to Kansas City, Kansas, of merchandise consigned to persons in Kansas City, Missouri, and hauling it back again to its intended destination in Kansas City, Missouri, was actually interstate transportation * * * That fact, however, does not require the conclusion that the State's action for the protection of its intrastate commerce was invalid * * * We may assume that Congress could regulate interstate transportation of the sort here in question, whatever the motive of those engaging in it. But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected * * * If appellant's hauling of the merchandise in question across the state line was not in good faith but was a mere subterfuge to evade the State's requirement as to intrastate commerce, there is no ground for saying that the prohibition of the use of the interstate permit to cover such transactions, and the application of the Commission's rule prohibiting them in the absence of an intrastate certificate was an unwarrantable intrusion into the federal field or the subjection of interstate commerce to any unlawful restraint * * *"

In *Central Greyhound Lines* v. *Mealey*, 334 U. S. 653, 92 L. ed. 1633 (1948), a carrier of passengers between termini in New York transported them over a route 42% of which was in other states. New York imposed a gross receipts tax on the total operation, and the New York Court of Appeals held that 'This is not interstate commerce.' The Supreme Court held that only 58% of the gross receipts could be taxed in New York. The court's opinion intimates that the *Eichholz* test is still valid, saying (p. 660):

"There is no suggestion here that the interstate routes were utilized as a means of avoiding even in part New

York's taxation. Compare, e.g., *Eichholz* v. *Public Serv. Commission*, 306 U. S. 268, 83 L. ed. 641, 59 S. Ct. 532, and *Ryan* v. *Pennsylvania Pub. Utility Commission*, 143 Pa. Super 517, 17 A 2d 637. We are not dealing with a necessary deviation or a calculated detour."

The Motor Carrier Act of 1935 provides that a carrier seeking a grandfather certificate must prove that he 'was in *bona fide* operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made * * *' Thus the statute compels the courts to give meaning to the elusive phrase *'bona fide.'* In *Eastern Carrier Corporation* v. *United States*, 31 F. Supp. 232 (1939) the applicant, prior to 1935, transported property between terminal in Pennsylvania. First it ran through Hackettstown, about 25 miles over in New Jersey, and then established a terminal at Bridgeville, New Jersey, about five miles from the border. The Interstate Commerce Commission decided that this was not *bona fide* interstate commerce, saying:

"The fact that a terminal has now been erected at Bridgeville and the routes have been shortened by using that as a transfer point instead of Hackettstown does not give the color of genuineness to operations which, from their very inception, were fraudulent.'

The three-judge federal court agreed with the Commission, saying (p. 237):

> "The Eichholz case appears to be nearly the converse of that at bar. The Supreme Court, by the Chief Justice, stated (306 U. S. at page 274, 59 S. Ct. at page 535, 83 L. Ed. 641): 'If appellant's hauling of the merchandise in question across the state line was not in good faith but was a mere subterfuge to evade the State's requirement as to intrastate commerce, there is no ground for saying that the prohibition of the use

of the interstate permit to cover such transactions, and the application of the Commission's rule prohibiting them in the absence of an intrastate certificate, was an unwarrantable intrusion into the federal field or the subjection of interstate commerce to any unlawful restraint.' The language employed by the Supreme Court in the cited case, we think, casts illumination upon the common sense interpretation which must be given to the phrase *'bona fide* operation' employed in the grandfather clause of the Motor Carrier Act."

Dohrn Transfer Co. v. *Hoegh*, 116 F. Supp. 177 (1953) was a suit before a three-judge court to enjoin state officials from enforcing Section 325.6 of the Code of Iowa as amended in 1953. The 1953 amendment provided:

"It is hereby declared unlawful for any motor carrier to transport over a regular route or between fixed termini any person or property, for compensation, from any point or place in the state of Iowa to another point or place in said state irrespective of the route, highway or highways traversed, *including the crossing of any state line of the state of Iowa,* or the ticket or bill of lading issued and used for such transportation, without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation." (Italics supplied)

This statute is right in the teeth of 49 U. S. C. A. § 303 (10) which provides:

"The term 'interstate commerce' means commerce between any place in a State and any place in another State *or between places in the same State through another State*, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water." (Italics supplied)

The court refused to hold Section 325.6 void on its face, for the reason that it could be enforced to the extent permitted by the *Eichholz* test without conflicting with the federal statute. The court said (p. 189):

> "In situations such as those disclosed in the case of *Eichholz* v. *Public Service Commission of Missouri*, 1939, 306 U. S. 268, 59 S. Ct. 532, 83 L. Ed. 641, the commerce clause would not be an impediment to the enforcement of the provisions of Section 325.6 as amended or to its applicability.
>
> "It is not deemed necessary in the present case to make a declaration as to the constitutionality of Section 325.6 as amended. The plaintiff will be afforded adequate relief by treating the provisions of that Section as not applicable to the plaintiff and enjoining the members of the Iowa Commerce Commission accordingly."

The court took a realistic and common sense view of both statutes. It did not take either the federal statute or the state statute literally. It construed both of them in conformity with the rule laid down by the Supreme Court in *Eickholz*, namely, that a movement over a state line is subject to state jurisdiction if the movement is abnormal. The essence of the *Eichholz* rule is contained in the Supreme Court's quotation (at p. 271) of the District Court's finding that the carrier's route was not 'the normal, regular or usual route.'

There can be no doubt whether a route is normal, regular or usual.

In the *Dohrn Transfer Co.* case the routes followed by the carrier through Illinois between towns in Iowa were normal, regular and usual because bends in the Mississippi river made it normal, etc., to cross the river over and back.

To illustrate this point the court gives a table of miles on page 180 of its opinion showing that the routes through Illinois were either the same as, shorter than or not more than three miles longer than the intrastate routes in Iowa.

We have no doubt that the shipments set forth in the rule to show cause were subject to regulation by Virginia within the rule laid down in the *Eichholz* case. That rule clearly does not authorize the defendant to carry a parcel across the state line and then bring it back into Virginia over the same route. It would not be normal, regular or usual to transport goods from Roanoke to Bluefield, W. Va., and back to Salem or back to Pearisburg.

King, Chairman and Hooker, Commission, concur."

In applying the Eichholz rule there might be some situations in which reasonable men might differ as to whether a given route is "the normal, regular or usual route." Because of that possibility the following letters were exchanged between counsel for the carrier and commerce counsel:

"Washington 6, D. C.

July 12, 1956.

William C. Seibert, Esquire
Commerce Counsel
State Corporation Commission
Commonwealth of Virginia
Richmond, Virginia

"Dear Mr. Seibert:

"Yesterday I received from the Virginia State Corporation Commission its order holding that the operations complained of in case No. 13074 Commonwealth of Virginia v. Service Storage and Transfer Company, Inc., constitute operations in intrastate commerce in violation of certain provisions of the code of Virginia. I am reporting the results of this proceeding to officials

of the company with recommendations and I expect to be advised on the company's intentions in respect to appeal or other action by July 20, 1956. In the circumstances, may I request that the effectiveness of the commission's order be delayed until August 1, 1956, so that the company may make determinations as to what future action, if any, should be taken.

"I desire to re-emphasize that it is the company's intention to comply with both the law of Virginia and the requirements of the Interstate Commerce Commission and the certificate which the carrier holds. As we advised your Commission during the course of the hearing on this matter, the carrier is anxious to be informed with some degree of certainty as to what it may or may not do in transporting shipments between Virginia points through the gateway of Bluefield, West Virginia. The opinion of the Commission itself recognizes (Page 2, second paragraph) that 'transportation from points in a state to another point in the same state is *sometimes* interstate commerce.' The carrier's position on the matter is that it is entitled to know what standards or guides are to be used in determining when a particular movement constitutes interstate commerce and when it does not. In an effort to avoid protracted litigation on the question, we respectfully request your office to advise us informally as to what its judgment is on the matter. For as you can understand in the absence of an authoritative guide or standard, the carrier would continue to subject itself to prosecutions and fines on the acceptance and transportation of any shipment moving from one Virginia point to another. The carrier and its officials are fully aware that the problem is one that has a 'twilight zone' and presents difficulty for your enforcement staff. It believes, however, that the continued attitude of cooperation between the carrier and your office may result in an appropriate solution to the problem.

Very truly yours,

Francis W. McInerny."

"COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION
Richmond

July 13, 1956.

Francis W. McInerny, Esquire
1625 K Street, N.W. Washington 6, D. C.

Dear Mr. McInerny:

Company, Incorporated.

"A reasonable time is given for the payment of fines assessed by the Commission. We shall expect this fine to be paid in that time.

"Concerning the statement in your letter that the carrier is entitled to know what standards or guides are to be used in determining when a particular movement constitutes interstate commerce and when it does not, I will advise you that it appears to me you have a choice of two courses. Under the Rules of Practice and Procedure of this Commission, and I am enclosing a pamphlet containing these rules, you may ask for a declaratory judgment. This is referred to under Rule 13 as shown in the pamphlet attached. The alternative it appears to me, is to reach an agreement as to what might be considered interstate movement and what might be considered (sic) and what might be considered

"I have your letter of July 12, regarding the decision of this Commission in Case No. 13074 in which a fine of $25.00 and costs was assessed against the Service Storage & Transfer intrastate movement on shipments in the territory served by the Service Storage and Transfer Company, Incorporated. I believe, as I stated to you before, that we could reach some sort of an agreement as to what points we would consider as properly interstate and unless we received a complaint with respect to the movement we would allow our investigators to observe the same understanding. This agreement might be reached after a conference between us.

"I am sure you understand that it is our desire to cooperate with you and your client at all times. We are here to assist as well as to regulate.

Very truly yours,

William C. Seibert
Commerce Counsel."

Thereafter our inspectors on the highways reported that the defendant had not changed its method of doing business; and the rule in the present case was issued. The rule came on for hearing on November 29, 1956, and the evidence and argument followed the same pattern as in the prior case. Counsel for the defendant asked leave to file a brief and leave was granted on the assumption that the defendant would abide by the law laid down in the prior case in the meantime.

The final judgment in this case was entered on February 26, 1957. The judgment describes ten routes that the carrier has served in intrastate commerce and fines the defendant $500 for each of ten violations.

Counsel for the defendant makes the point that the Interstate Commerce Commission has jurisdiction to interpret the meaning of its own certificates. We do not find in the record evidence that that Commission has interpreted the defendant's certificate to mean that it is authorized to do what we have punished it for doing. There are of course limits on the authority of a federal commission to interpret certificates issued by it. It could not, under the guise of interpretation, enlarge the authority delegated to it by Congress or the power delegated to Congress by the Constitution.

Because of our federal form of government the present case is of great importance to the states. If the contentions so earnestly advanced by counsel for defendant are correct, it would follow that a carrier holding a federal certificate

of convenience and necessity to operate over Route 1 between Baltimore and Richmond could do the following things: (1) It could pick up freight in Alexandria, take it to Washington and bring it to Richmond. (2) It could pick up freight in Richmond, take it to Washington and bring it back to Ashland.

If the defendant is right in saying that its certificates *permit* it to haul by circuitous routes between Virginia cities, it necessarily follows that its certificates *compel* it to perform those circuitous movements. A common carrier *must* render all the services that its certificate *authorizes* it to render.

In issuing certificates of convenience and necessity the regulatory bodies are required by the governing laws to issue no more certificates than are necessary to serve the public. State certificates cannot authorize a carrier to cross the state line. If federal certificates can authorize the movement of goods from Richmond to Ashland or Richmond to Petersburg the state regulatory pattern will be destroyed and the beneficent purposes of the state laws cannot be accomplished. Our conclusions are (1) The Constitution does not authorize Congress to regulate the transportation of a parcel consigned from Roanoke to Salem; (2) Congress has not authorized the I. C. C. to regulate the transportation of a parcel consigned from Roanoke to Salem; (3) The I. C. C. has not authorized the defendant to transport a parcel consigned from Roanoke to Salem. The defendant may transport freight from one Virginia city to another only when a normal, regular or usual route between the cities crosses the state line.

Hooker, Commissioner, concurs.

APPENDIX IV

Richmond

SERVICE STORAGE AND TRANSFER COMPANY, INC.

v.

COMMONWEALTH OF VIRGINIA

March 10, 1958

Record No. 4748

Present, All the Justices.

WHITTLE, J., delivered the opinion of the court.

This is an appeal of right from an order of the State Corporation Commission wherein Service Storage and Transfer Company, Inc. (hereinafter called Service) was fined $500 for each of ten alleged violations of Chapter 12, Title 56, Code of Virginia, 1950, the aggregate of the fines being $5,000.

The case grows out of a prosecution of Service under § 56-304.12 of the Code for allegedly operating as a common carrier in intrastate commerce on the highways of Virginia without a certificate of convenience and necessity in violation of § 56-278.

Service is a common carrier by motor vehicle, operating under authority of Certificate No. MC-30471, issued by the Interstate Commerce Commission. The territory covered in the certificate follows:

"Between Bluefield, Va., Bluefield, W. Va., and points and places within five miles of Bluefield, W. Va.

[1] "Between Bluefield, Va., and points and places within five miles of Bluefield, Va., and those within five miles of

Bluefield, W. Va., respectively, on the one hand, and, on the other, points and places in that part of Virginia and West Virginia within 75 miles of that territory.

[2] "Between Bluefield, W. Va., on the one hand, and, on the other, points and places in West Virginia, that part of Virginia west of U. S. Highway 29 and south of U. S. Highway 60 including points and places on the indicated portions of the highways specified, and that part of Virginia north of U. S. Highway 60 which is within 80 miles of Bluefield, W. Va."

The manifest object of the Interstate Commerce Commission's certificate was to permit Service to engage in interstate commerce. This is the extent of the commission's jurisdiction. Under the ICC certificate Service was empowered, (1) to gather freight within the defined territory and transport it out of Virginia into other jurisdictions; and (2) to gather freight within the defined territory, haul it out of the State and thence back to points within the defined territory, provided it acted in good faith and did not route the freight out of Virginia for the purpose of evading Virginia's jurisdiction. We are here concerned with the latter right.

It is contended by the Commonwealth that Service operates between points in Virginia by way of Bluefield, West Virginia; that the routes employed are not the usual or normal routes but are circuitous routes used for the purpose of evading the Virginia law; that Service was fined on July 9, 1956 for similar violations from which no appeal was taken; that since the imposition of that fine Service has continued to violate the rule issued by the State Corporation Commission, resulting in the issuance of the present rule which is the basis for the fines involved on this appeal.

A fine of $500 was imposed upon Service for goods shipped by alleged circuitous routes in each of the following instances:

Origin	*Destination*
Roanoke, Virginia	Glen Lyn, Virginia
Lynchburg, Virginia	Draper, Virginia
Roanoke, Virginia	Wytheville, Virginia
Bristol, Virginia	Carbo, Virginia
Bluefield, Virginia	Haysi, Virginia
Bristol, Virginia	Wise, Virginia
Roanoke, Virginia	Kimbleton [Kimballton], Va.
Bristol, Virginia	Cranes Nest, Virginia
Lynchburg, Virginia	Marion, Virginia
Roanoke, Virginia	Abingdon, Virginia

It was stipulated that each shipment went through Bluefield, West Virginia.

The Commonwealth established by uncontradicted evidence that Service did not follow the usual or normal route between the points involved. It was urged that the goods in question had been shipped by Service over unnecessarily long and circuitous routes for the sole reason that it did not hold a certificate of convenience and necessity from the State Corporation Commission of Virginia.

The several charges against Service were developed by the Commonwealth as follows:

On August 21, 1956, an investigator of the Division of Motor Transportation of the State Corporation Commission stopped a truck owned by Service on Route 460, one mile north of Pearisburg, Virginia, on which was found a shipment from Rish Equipment Company, Roanoke, Virginia, to the Heron Todd Steel Construction Company, Inc., Glen Lyn, Virginia. This shipment had moved from Roanoke to Bluefield, West Virginia, and thence back to Glen Lyn, whereas the usual or normal route would have been direct from Roanoke to Glen Lyn, entirely within the State.

On August 22, 1956, an investigator stopped a truck owned by Service on Route 460, one mile north of Pearisburg, Virginia, where he found a shipment from Norfolk and Western Industries, Inc., Lynchburg, Virginia, to Sutphin and Jackson, Draper, Virginia. This shipment had moved from Lynchburg to Bluefield, West Virginia, and thence back to Draper, when the usual or normal route would have been from Lynchburg to Draper, wholly within the State.

On September 6, 1956, an investigator stopped a truck owned by Service on Route 460, one mile north of Pearisburg, Virginia, wherein he found a shipment from Leonard Electronics, Roanoke, Virginia, to Wytheville Vance Company, Wytheville, Virginia. This shipment moved from Roanoke through Bluefield, West Virginia, and thence back to Wytheville. The usual or normal route for this shipment would have been from Roanoke to Wytheville, wholly within the State.

On September 11, 1956, an investigator stopped a truck owned by Service on Route 58 near St. Paul, Virginia, on which he found a shipment from Bristol Steel and Iron Works, Bristol, Virginia, to Link Belt Company, Carbo, Virginia. This shipment moved from Bristol to Bluefield, West Virginia, and thence back to Carbo, when the usual or normal route would have been from Bristol to Carbo, wholly within the State.

On September 11, 1956, a truck owned by Service was stopped by an investigator on Highway 58, near St. Paul, Virginia. The truck contained a shipment from F. D. Lazenby and Company, Bluefield, Virginia, to Haysi Hardware Company, Haysi, Virginia. This shipment went from Bluefield, Virginia to Bluefield, West Virginia, and thence back to Haysi, and did not take the usual or normal route which lies wholly within the State.

On September 13, 1956, another shipment was involved, from Bristol Steel and Iron Works, Bristol, Virginia, to Quesenberry Construction Company, Wise, Virginia. This shipment moved from Bristol to Bluefield, West Virginia, thence back to Wise, when the usual or normal route would have been from Bristol to Wise, wholly within the State.

On September 17, 1956, an investigator stopped a truck owned by Service at the junction of U. S. Highway 58 and 72, at Coeburn, Virginia, on which he found a shipment of iron railway car wheels from Enterprise Wheel and Car Corporation, Bristol, Virginia, to Banner Fuel Corporation, Cranes Nest, Virginia. This shipment moved from Bristol to Bluefield, West Virginia, thence back to Cranes Nest, when the usual or normal route would have been from Bristol to Cranes Nest, wholly within the State.

An examination of the maps of the State of Virginia, introduced as exhibits, showing the network of improved roads between the points here involved, conclusively shows that the routes used by Service in moving the various shipments were not the usual or normal routes. The commission was justified in finding, on this uncontradicted evidence, that Service had used these circuitous routes in an effort to bring the shipments within the purview of the authority granted under its certificate from the Interstate Commerce Commission.

[1] Service assigns six errors, the first four of which can be embodied in the question: Is the State Corporation Commission vested with the authority to regulate intrastate commerce in these instances and, if so, did it act within the grant of that authority in assessing the fines upon Service? Service thus contends that the action of the State Corporation Commission is beyond its jurisdiction. Section 56-278, Code of Virginia, 1950, reads:

"§ 56-278. REQUIRED CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY.—No common carrier by motor vehicle or restricted common carrier by motor vehicle not herein exempted shall engage in intrastate operation on any highway within the State without first having obtained from the Commission a certificate of public convenience and necessity authorizing such operation, and a statement of the State Highway Commission that the law applicable to the proposed route or routes has been complied with as to size, weight, and type of vehicles to be used, and a like statement as to any increase in size, weight, and type of vehicles proposed to be operated by the applicant after such application is granted."

It is clear from the above section that the State Corporation Commission is vested with authority to issue certificates of public convenience and necessity in proper instances where a common carrier by motor vehicle applies for same. The obvious purpose of the section is to give the Commission control over intrastate traffic on the highways of the Commonwealth. It is conceded that Service did not hold such a certificate.

The governmental regulation and supervision by a State of its internal commerce may lawfully be exerted through validly constituted administrative commissions or boards. *Pa. R. R. Co.* v. *Towers*, 245 U. S. 6, 62 L. ed. 117, 38 S. Ct. 2, L.R.A. 1918C 475.

A commission, if authorized by the law of the State, may make orders and regulations concerning intrastate commerce which do not conflict with the enactments of Congress, and its discretion in this respect may be exercised upon a view of all existing relevant facts and circumstances. *Ill. C.R.R. Co.* v. *De Fuentes*, 236 U. S. 157, 59 L. ed. 517, 35 S. Ct. 275.

It will be observed that the commerce here involved moved from points in Virginia through Bluefield, West Virginia, and then back to points in Virginia. Service argues in its brief that such movements constitute interstate commerce as defined by its ICC certificate. It says:

"The carrier (Service) also accepts for transportation shipments moving from one Virginia point within the described territory to a second Virginia point within the described territory. This is done by using the two separate grants set forth above in combination (meaning paragraphs 1 and 2 in its ICC certificate heretofore quoted). It is as though two independent carriers were interchanging freight, one with the other, at Bluefield, West Virginia. To exemplify, upon receiving a request to transport a shipment from Lynchburg, Virginia, to Draper, Virginia, the carrier would pick up the shipment at Lynchburg under the authority contained in the first paragraph set forth above, and transport it to its terminal at Bluefield, West Virginia. Upon arrival at that point, the shipment would be transported to the Virginia destination under the authority contained in the second paragraph set forth above."

Such a movement as suggested would be a mere subterfuge, and an attempt to divest the State Corporation Commission of its jurisdiction over intrastate commerce. 15 C. J. S., Commerce, § 24, pp. 289, 290, Footnote 18. Why ship goods from Lynchburg, Virginia, to Draper, Virginia, through Bluefield, West Virginia, when the obvious usual or normal route would be direct from Lynchburg to Draper, wholly within the State?

"Whether any transaction constitutes interstate or intrastate commerce depends on the essential character of what is done and the substantial surrounding circumstances." 15 C. J. S., Commerce, § 18, p. 278.

Of course, there are many instances in which shipments between points in the same State can properly be identified as interstate commerce, where the shipments follow the usual or normal routes between the points involved. That is not the case here. An examination of the evidence which includes the map exhibits of Virginia and West Virginia clearly shows that the "normal or usual" routes were not followed between the Virginia points involved. On the contrary, the shipments were hauled miles out of the way, over circuitous routes, in order to accomplish the purpose sought."

The reasoning employed in *Eichholz* v. *Public Service Commission*, 306 U. S. 268, 83 L. ed. 641, 646, 59 S. Ct. 532, is applicable here. There it is said:

"Appellant insists that the hauling from St. Louis over the State line to Kansas City, Kansas, of merchandise consigned to persons in Kansas City, Missouri, and hauling it back again to its intended destination in Kansas City, Missouri, was actually interstate transportation. * * * That fact, however, does not require the conclusion that the State's action for the protection of its intrastate commerce was invalid. See Lone Star Gas Co. v. Texas, 304 U. S. 224, 238, 82 L. ed. 1304, 1314, 58 S. Ct. 883. We may assume that Congress could regulate interstate transportation of the sort here in question, whatever the motive of those engaging in it. But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected. * * * If appellant's hauling of the merchandise in question across the State line was not in good faith but was a mere subterfuge to evade the State's requirement as to intrastate commerce, there is no ground for saying that the prohibition of the use of the interstate permit to cover such transactions, and

the application of the Commission's rule prohibiting them in the absence of an intrastate certificate, was an unwarrantable intrusion into the federal field or the subjection of interstate commerce to any unlawful restraint. * * *."

The reasoning employed in *Eastern Carrier Corp.* v. *U. S.*, 31 F. Supp. 232, 236, is also applicable:

"* * * Thus it may not be concluded that because a carrier transports merchandise across a state line in order to evade the orders of a state public service commission, it has thereby engaged in bona fide interstate commerce serving public convenience and necessity. Upon the contrary, the purpose which the carrier has served by such operation is a purely private purpose, the evasion of the laws of a state.

"The definition sought to be applied by the plaintiff for the phrase 'bona fide operation' is one which cannot be supported with any show of reason. This clearly appears from the authority which the plaintiff itself cites in Slagle Contract Carrier Application, 2 M. C. C. 127, 141, wherein the Commission said: '* * * The Latin words "bona fide" mean "in good faith." Webster's New International Dictionary defines "bona fide" as "in or with good faith; without fraud or deceit; real or really; actual or actually; genuine or genuinely." As defined in Black's Law Dictionary, the words mean "in or with good faith; honestly, openly, and sincerely; without deceit or fraud".'"

Under our dual system of government, the inherent sovereign power to regulate intrastate transportation by common carriers is reserved to the State, and within the limitation of the State Constitution the authority of the legislature is supreme in the regulation of intrastate transportation by common carriers unless such regulation in effect deprives a person of property without due process of law or materially burdens interstate commerce in violation of the Constitution of the United States. On the other hand, the power to

regulate interstate and foreign commerce is, by provisions of the Federal Constitution, vested in Congress, and has been exercised by the enactment of the Interstate Commerce Act. 9 Am. Jur., Carriers, §44, p. 453, and cases cited under Footnote 17.

The question for decision is whether the instant shipments involved intrastate or interstate commerce. Our conclusion is that under the facts and circumstances established they involve intrastate commerce and are thus amenable to the jurisdiction of State authority.

[2] Service's next assignment of error challenges the right of the State Corporation Commission to assess fines against it in the absence of a rule to show cause alleging specific violations. This assignment is directed to three alleged shipments, originating at Roanoke, Lynchburg and Roanoke, Virginia; their respective destinations being Kimballton, Marion, and Abingdon, Virginia.

The Attorney General concedes the lack of proper allegations and proof to justify the fines imposed in these three instances. This will require an amendment to the Commission's order, resulting in a reduction in the combined fines against Service from $5,000 to $3,500.

The final assignment of error reads: "The Commission erred in holding that its decision in a prior case is res adjudicata as to the issues involved in this proceeding."

In view of our disposition of the case on its merits it is not necessary to consider this assignment.

For the reasons stated the order of the State Corporation Commission is affirmed in part, reversed in part and remanded, with directions that the order be amended in accordance with the views here expressed.

Affirmed in part; reversed in part, and remanded.

APPENDIX V

§ 56-304.12. Offenses punishable by the State Corporation Commission. — The Commission may, by judgment entered after a hearing on notice duly served on the defendant not less than ten days before the date of the hearing, if it be proved that the defendant made any misrepresentation of a material fact to obtain a warrant, exemption card or registration card, has made any improper use of any warrant, exemption card, registration card, classification plate, identification marker or identifying number, has violated any law of this State regulating the operation of motor vehicles for compensation on the highways of this State, has failed to make any report required by the Commission, has failed to pay any fee or tax properly assessed against him or has failed to comply with any lawful order, rule or regulation of the Commission, impose a penalty, not exceeding one thousand dollars, which shall be collectible by the process of the Commission as provided by law.

In addition to imposing such penalty, or without imposing such penalty, the Commission may, in any such case, suspend or revoke any warrant, exemption card, registration card, classification plate, identification marker or identifying number issued pursuant to this article.

If, in any such case, it appears that the defendant owes any fee or tax to the Commonwealth, the Commission shall enter judgment therefor.

APPENDIX VI

§ 56-278. Required certificates of public convenience and necessity. — No common carrier by motor vehicle or

restricted common carrier by motor vehicle not herein exempted shall engage in intrastate operation on any highway within the State without first having obtained from the Commission a certificate of public convenience and necessity authorizing such operation, and a statement of the State Highway Commission that the law applicable to the proposed route or routes has been complied with as to size, weight, and type of vehicles to be used, and a like statement as to any increase in size, weight, and type of vehicles proposed to be operated by the applicant after such application is granted.

APPENDIX VII

§ 49 U. S. C. 303

(10) The term "interstate commerce" means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water.

APPENDIX VIII

§ 49 U. S. C. 304

Investigation of complaints; orders

(c) Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed

to comply with any provision of this chapter, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.

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In the

Supreme Court of the United States

October Term, 1958

No. 92

SERVICE STORAGE AND TRANSFER COMPANY, INCORPORATED,
Petitioner

v.

COMMONWEALTH OF VIRGINIA,
Respondent

On Writ of Certiorari to the Supreme Court of Appeals of Virginia

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Supreme Court of Appeals of Virginia is reported as *Service Storage and Transfer Company, Incorporated* v. *Commonwealth of Virginia*, 199 Va. 797, 102 S. E. 2d 339 (R. 89). The opinion of the State Corporation Commission of Virginia is set forth as *State Corporation Commission* v. *Service Storage and Transfer Company, Incorporated*, and is found on page 74 of the printed record. The opinion of the Interstate Commerce Commission, which the petitioner alleges is in conflict with the views expressed in the opinion of the Supreme Court of Appeals of Virginia,

referred to above, is reported as *Service Storage and Transfer Company, Inc.—Petition for Declaratory Order*, 71 M. C. C. 304.

JURISDICTION

The judgment of the Supreme Court of Appeals of Virginia was entered on March 10, 1958 (R. 88). The petition for a writ of certiorari was filed on June 9, 1958, and was granted on October 13, 1958 (R. 98). The jurisdiction of this Court was invoked under Title 28 U. S. C. 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Federal Constitutional Provisions, Article I, Section 8:

> "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

Federal Constitutional Provisions, Article VI:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Federal Statutes

Interstate Commerce Act, Part II, Section 203(10); Title 49, U. S. C., Section 303(10):

> "The term 'interstate commerce' means commerce between any place in a state and any place in another state or between places in the same state through

another state, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water."

Interstate Commerce Act, Part II, Section 204(c); Title 49, U. S. C., Section 304(c):

"Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint."

Virginia Statutes

Title 56, Code of Virginia, Section 278; Vol. 8, page 235:

"No common carrier by motor vehicle or restricted common carrier by motor vehicle not herein exempted shall engage in intrastate operation on any highway within the state without first having obtained from the Commission a certificate of public convenience and necessity authorizing such operation, and a statement of the State Highway Commission that the law applicable to the proposed route or routes has been complied with as to size, weight, and type of vehicles to be used, and a like statement as to any increase in size, weight and type of vehicles proposed to be operated by the applicant after such application is granted."

Title 56, Code of Virginia, Section 304.12; Vol. 8, Cum. Supp.:

> "The Commission may, by judgment entered after a hearing on notice duly served on the defendant not less than ten (10) days before the date of the hearing, if it be proved that the defendant made any misrepresentation of a material fact to obtain a warrant, exemption card or registration card, has made any improper use of any warrant, exemption card, registration card, classification plate, identification marker or identifying number, has violated any law of this state regulating the operation of motor vehicles for compensation on the highways of this state, has failed to make any report required by the Commission, has failed to pay any fee or tax properly assessed against him or has failed to comply with any lawful order, rule or regulation of the Commission, impose a penalty not exceeding One Thousand Dollars ($1,000.00), which shall be collectible by the process of the Commission as provided by law."

QUESTIONS PRESENTED

The petitioner presents the following questions for the decision of this Court:

> "(1) Whether a state agency lawfully may impose criminal sanctions on a motor common carrier for conducting interstate operations in accordance with the carrier's interstate certificate of public convenience and necessity as construed by the Interstate Commerce Commission."

> "(2) Whether the enforcement of a state statute in a manner which requires discontinuance of motor carrier operations authorized by order of the Interstate Commerce Commission is in conflict with Part II of

the Interstate Commerce Act and in contravention of the 'Commerce clause' of Article I, Section 8 of the Federal Constitution."

"(3) Whether a state agency which desires a certificated interstate motor carrier to discontinue allegedly unlawful operations must seek relief from the Interstate Commerce Commission as provided in Section 204(c) of Part II of the Interstate Commerce Act."

STATEMENT OF THE CASE

a.

Preliminary Statement

This case is an appeal from the judgment of the Supreme Court of Appeals of Virginia of March 10, 1958, affirming in part and reversing in part an order entered on February 26, 1957, by the State Corporation Commission of Virginia wherein Service Storage and Transfer Company was fined for violating the provisions of Chapter 12, Title 56 of the Code of Virginia (1950). The Interstate Commerce Commission's decision (by Division I) in *Petition for Declaratory Order — Service Storage and Transfer Company, Inc.*, was rendered on March 29, 1957, approximately one month after the decision of the State Corporation Commission of Virginia in this matter.

b.

Statement of Facts

The respondent believes that the Statement of the Case contained in the appellant's opening brief requires amplification in some respects.

Service Storage and Transfer Company, hereinafter referred to as "Service" or "Petitioner" is a common carrier,

operating pursuant to the authority of certain certificates of public convenience and necessity issued by the Interstate Commerce Commission, and uses Bluefield, West Virginia as a "gateway" to and from the Commonwealth of Virginia. On September 19, 1956, the State Corporation Commission issued a rule pursuant to the authority vested in it by Section 56-304.12 of the Code of Virginia (1950), which rule reads in part as follows:

> "It appears to the Commission that Service Storage & Transfer Company, Incorporated, of Bluefield, West Virginia, was found to be hauling property in intrastate commerce without authority of the State Corporation Commission and in violation of Chapter 12, Title 56 of the Code of Virginia on the following occasions, to-wit:" (R. 2)

Thereafter, a hearing was held by the State Corporation Commission on November 29, 1956, and, on February 26, 1957, the Commission entered an order fining Service for operating as a common carrier by motor vehicle in intrastate commerce without a certificate of public convenience and necessity from the Corporation Commission in violation of Section 56-278 of the Code of Virginia. The Commission's opinion on this matter was rendered on March 21, 1957. Thereafter, Service appealed this case to the Supreme Court of Appeals of Virginia, which court held that Service was in violation of Section 56-278 of the Code in seven of the ten instances in question and, therefore, affirmed in part and reversed in part the order of the Corporation Commission, and directed the Commission to amend its order in conformity with the Court's opinion. Service was, therefore, fined a total of $3500.00 for the following seven shipments:

ORIGIN	DESTINATION
Bluefield, Virginia	Haysi, Virginia
Roanoke, Virginia	Glen Lyn, Virginia
Lynchburg, Virginia	Draper, Virginia
Roanoke, Virginia	Wytheville, Virginia
Bristol, Virginia	Carbo, Virginia
Bristol, Virginia	Cranes Nest, Virginia
Bristol, Virginia	Wise, Virginia

It was stipulated that all of these shipments were routed through Bluefield, West Virginia (R. 22). It is manifest from the evidence contained in the record that these seven shipments were clearly intrastate in character. If they had been moved by direct routes they never would have left the boundaries of the Commonwealth. However, the shipments in question did not follow these normal, logical routes, but were carried over abnormal, circuitous and unnecessarily long routes. Moreover, the petitioner admits that there are instances when the shipment of goods between two Virginia points through Bluefield, West Virginia, does not constitute Interstate Commerce.

> "Mr. McInerny: I don't know whether Mr. Seibert has been advised of this or not, that since the issuance of the last rule, many questionable operations were terminated, and by reason of the delay involved to some of the shippers and consignees, we had to make adjustments, and some have not been able to make adjustments, to replace the carrier service afforded by respondent, and they have submitted charges to Mr. Seibert that there is nothing available for them to do and that they know there is interstate commerce through Bluefield and through Bluefield, West Virginia, and the billings are on interstate commerce billings governed by interstate tariffs, and I feel confident everything I have said is factually accurate." (R. 7)

The petitioner does not hold a certificate of public convenience and necessity from the State Corporation Commission which would permit it to move these intrastate shipments over the direct routes mentioned above. This is not the first instance that the petitioner has been fined for engaging in this type of operation. On July 9, 1956, Service was fined for engaging in a similar type of operation (R. 76). It is manifest that the petitioner employed these unnecessarily long, circuitous and abnormal routes in an attempt to evade the jurisdiction of the Commonwealth of Virginia.

OUTLINE OF ARGUMENT

Part I.

The seven shipments involved herein are intrastate in character and are subject to State regulations even though they were moved into West Virginia. Service employed long and circuitous routes in an attempt to evade State law. The petitioner's I. C. C. certificate does not authorize it to transport intrastate shipments in the manner described.

Part II.

A state regulatory agency is vested with the authority to determine whether state laws are being violated by a certified interstate motor carrier. This is true even when the carrier asserts that it is acting pursuant to the authority granted it by the Interstate Commerce Commission. When such assertion is made a state tribunal may determine whether such certificate is controlling or if it is being used as a guise by the carrier in an attempt to evade state law. Where intrastate commerce is involved, the State's authority to control is supreme. Even if this commerce is in fact interstate, the State may still control such commerce because it is essentially local in character and of vital interest to this State.

ARGUMENT

I.

The Intrastate Character of These Shipments

(a)

THE EVIDENCE SHOWS THE SEVEN SHIPMENTS TO BE INTRASTATE

The petitioner in his opening brief ignores completely the factual situation herein involved and asserts rather blithely that these shipments are interstate simply because they were transported in motor vehicles which moved through Bluefield, West Virginia. The position of the Commonwealth is that the evidence clearly shows that these shipments were intrastate in character, and that this factor is in and of itself controlling in the determination of this controversy.

The routes employed by Service in moving these shipments were unnecessarily long, abnormal and circuitous. It is, we believe, sufficient to show the facts relative to the routing employed in one of these seven instances to substantiate our statement that the shipments were intrastate in character. The record reveals that, on September 6, 1956, an investigator of the Division of Motor Transportation of the State Corporation Commission stopped a truck on Route 460, one mile north of Pearisburg, Virginia, and found therein a shipment from Leonard Electronics, Roanoke, Virginia, to Wytheville Vance Company, Wytheville, Virginia (R. 13). Wytheville, Virginia lies southwest of Roanoke, Virginia, and can be most easily reached by driving down Route No. 11 over reasonably flat country, some 80 miles. (See map, Exhibit No. 1, R. 99.) This particular shipment, however, was first moved to Bluefield, West Virginia, a distance of 111 miles (R. 15) from Roanoke and then back some 49 miles to Wytheville, Virginia. From this brief summation of the evidence, it is easily seen that this shipment was transported 160 miles, or some 80 miles more than

necessary had it been moved by the most direct route which lies wholly within the State. This is but one brief example of the factual matter contained in the record. An examination of the evidence pertaining to other shipments reveals that had they been moved by normal routes they would have remained within the confines of Virginia throughout their journey. All seven shipments were from Virginia origins to Virginia destinations, and in no case was it necessary that they leave the State.

The petitioner contends that he can change these intrastate shipments into interstate shipments by moving them via Bluefield, West Virginia. To support this assertion, with which we disagree, the petitioner points to the definition of interstate commerce as found in the Interstate Commerce Act, which reads as follows:

> "(10) The term 'interstate commerce' means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water." (49 U.S.C.A. § 303 (10))

It is manifest that Congress, by the above definition, did not intend to include such commerce as involved herein. Moreover, it is obvious that these operations were not bona fide operations. The Interstate Commerce Commission (Division 5) in *Slagle Contract Carrier Application*, 2 M. C. C. 127, discussed the term "bona fide," and the following language found on page 141 is applicable herein:

> "The Latin words 'bona fide' mean 'in good faith,' Webster's New International Dictionary defines 'bona fide' as 'in or with good faith; without fraud or deceit;

> real or really; actual or actually; genuine or genuinely.' As defined in Black's Law Dictionary, the words mean 'in or with good faith; honestly, openly, and sincerely; without deceit or fraud.' The Supreme Court in *Ware* v. *Hylton*, 3 U. S. 199, 241, defined them as follows:
>
> "Bona fide is a legal technical expression; and the law of Great Britain and this country has annexed a certain idea to it. It is a term used in statutes in England, and in acts of Assembly of all the States, and signifies a thing done really, with a good faith, without fraud or deceit, or collusion, or trust." (2 M. C. C. 141-2)

This definition of bona fide when applied to the facts of this case can result in only one conclusion. The fact that the shipments crossed a State line does not automatically change intrastate commerce into interstate commerce. This language from *Roundtree* v. *Terrell*, 22 F. Supp. 297, is applicable herein:

> "True it is that commerce is undoubtedly traffic plus intercourse, and the carriage of freight and passengers between two points in one state, during which route there is passage over the soil of another state, will not render that business foreign which is domestic." (22 F. Supp. 300)

Would these seven shipments, if moved by an ordinary prudent carrier not restrained by regulation, have been transported to Bluefield, West Virginia? The answer to this question is quite obviously—*No.* It is, therefore, manifest that these shipments are intrastate in character. Whether commerce is interstate or intrastate must be determined by the usual, normal movement of the freight, and not the movement of the vehicle by which it is transported. In this case the movement of the vehicle was not only abnormal and

illogical, but the routes employed were unnecessarily long and circuitous. The test which we urge this Honorable Court to adopt is the logical movement of the freight and not the operational movement of the vehicle.

(b)

THE ROUTES WERE EMPLOYED BY SERVICE AS A SUBTERFUGE TO EVADE STATE LAW

It has been heretofore demonstrated that it was unnecessary that these shipments leave this State. The question which next presents itself may be briefly stated as follows: *Why did Service engage in these peculiar operations?* It is obvious that these abnormal routes were used by the petitioner in an attempt to evade State regulation. The Corporation Commission of Virginia fined Service for engaging in this type of operation on July 9, 1956 (R. 76), and Service did not appeal that ruling. Thereafter Service continued its unusual operations and was again proceeded against by the Corporation Commission and fined. This case involves the second proceeding.

Service does not hold a certificate of public convenience and necessity from the Virginia Corporation Commission which would permit it to haul the shipments by direct routes, and the record does not indicate that this corporation has ever applied for such certificate. Without such Virginia certificate, the petitioner cannot transport the shipments involved herein which originate and terminate at Virginia points over the direct routes which lie wholly within this State. Service, therefore, moves this freight over long, circuitous routes via Bluefield, West Virginia. Having thus operated into West Virginia, Service then produces its I. C. C. certificate and states that this type of operation, although it is without reasonable basis, is in fact

interstate commerce. The petitioner further asserts that the mere crossing of the West Virginia State line will change intrastate commerce into interstate commerce, and chooses to ignore the character of the freight. The petitioner relies heavily on the case of *Western Union Telegraph Company* v. *Speight*, 254 U. S. 17, in making the above assertion. In that case it was held by your Honorable Court that the transmission of a telegram between two points in North Carolina through a point in Virginia is interstate commerce. It is important to emphasize that the evidence in that case is entirely different from that which is involved herein. The telegraph message originated at Greenville, North Carolina, and was destined to be delivered at Rosemary, North Carolina. This Court said:

> "As the line was arranged and had been arranged for many years, ever since Roanoke Rapids had been an independent office, Richmond was the relay point from Greenville to the latter place. The message went through Weldon, North Carolina, and was telegraphed back from Richmond, as Weldon business also was. It would have been possible, physically, to send direct from Weldon but would have required a rearrangement of the wires and more operators. The course adopted was more convenient and less expensive for the Company and there was nothing to show motives except the facts. As things were, the message was sent in the quickest way. * * *." (254 U. S. 11)

The petitioner also relies on this case in stating that the question of motive or good faith is not now involved in the controversy before this Court. The Supreme Court of the United States refused to express an opinion as to the motive of the telegraph company in transmitting the message through Virginia. The Court expressed the opinion

in this case, which was a suit for damages, that the motive was not material. Several matters are important when considering the court's holding in the Telegraph case. In the first instance, it would have been impossible for the telegraph company to transmit the telegram by a direct wire between two points in North Carolina. Secondly, the long practice of the company in conducting its operations in this manner, coupled with the fact that this method was less expensive, demonstrates the logical manner in which the message was handled. Finally, this case did not involve the regulation of the telegraph company by a state or federal authority. Taking these factors into consideration, it is submitted that this case is not controlling in this controversy in so far as "the actual transaction" is concerned for which proposition it is cited in the petitioner's brief. It is, however, important to note that the Court carefully examined the evidence relative to the manner in which Western Union operated and found that the facts demonstrated that the message had been moved in the quickest way possible. This is not true in this controversy. It would have been much quicker if Service had delivered these shipments by the direct routes, which are via highways lying within this State. Western Union could not transmit the message between two North Carolina municipalities because there were no wires linking them. The company, therefore, sent the wire the best way it could. There are, however, a sufficient number of well paved, improved highways connecting Virginia origins and destinations over which Service could transport the freight in question and never leave the State. In order to do so Service would have to secure a certificate of authority from the Virginia Commission, which it has not done.

The petitioner also quotes certain language from *Roundtree* v. *Terrell*, 22 F. Supp. 297, 299, on page 21 of his

opening brief. The mode of operation of the carrier Roundtree (doing business as Ozark Motor Lines) was transporting freight from points and places in Texas to a warehouse terminal in Texarkana, Arkansas, which is located on the Arkansas-Texas border. Ozark's trucks passed through Texarkana, Texas, late at night, on their way to the warehouse located one-half mile on the Arkansas side. The next morning the freight was moved in delivery trucks to Texarkana, Texas. In holding that this was interstate commerce, the District Court for the Northern District of Texas pointed out that the mere fact that a state line was traversed by freight moving between two points in the same state will not make such commerce interstate. Moreover, it is important to point out that the Ozark Motor Line's vehicles did not follow unusual and circuitous routes in transporting this freight. Their pattern of operation was both normal and logical. We emphasize again that the facts pertaining to each particular case are the controlling factors in the decisions of the courts. There was no evidence of a subterfuge in the Roundtree case.

Service seeks to evade the jurisdiction of Virginia by the mere linking of its intrastate freight to its interstate routes by operating over excessively lengthy routes. This Court condemned the subterfuge of linking intrastate and interstate commerce as an evasive scheme in the case of *Interstate Buses Corporation* v. *Holyoke Street Railway Company*, 273 U. S. 45, 51.

The decision of a three-judge court in the case of *Intercity Coach Company* v. *Atwood*, 21 F. 2d 83, Appeal refused 278 U. S. 663, is pertinent to this inquiry. The coach company sought to enjoin certain Rhode Island officials from its proposed operation on a bus line from Providence, Rhode Island to Woonsocket via Attleboro, Massachusetts. The

Court refused to accept the plaintiff's assertion that its motive for going into Massachusetts was immaterial, and found that such motive was indeed open to inquiry. The following language from this case is pertinent:

> "The question before us, taking the evidence most favorably to the plaintiff, is whether a bus, using the highways for carrying for hire intrastate passengers escapes state highway regulations because it may also carry an occasional interstate passenger. In our opinion it does not. Still less does it do so if (as on the present record is at least probable) the interstate character of the transportation is 'a discreditable subterfuge, to which this court ought not to lend its countenance.' Brown, J., Austin v. Tennessee, 179 U. S. 343, at page 361, 21 S. Ct. 132, 139 (45 L. Ed. 224). In Kirmeyer v. Kansas, 236 U. S. 568, 35 S. Ct. 419, 59 L. Ed. 721, an alleged interstate transaction is referred to by the court as being 'not a bona fide commercial arrangement.' In our opinion, interstate commerce, in order to be entitled to the protection of the federal Constitution, must be real and bona fide. The question whether it is so is open to inquiry." (21 F. 2d 85)

Several decisions by state courts relative to the questions of motive and abnormal operation exemplify the necessity for examining the facts of each particular case. The Superior Court of Pennsylvania, in the case of *Blackmore* v. *Public Service Commission*, 183 Atl. 115, in affirming an order of the Pennsylvania Commission which fined Blackmore $1,000 for attempting to evade State laws by moving intrastate shipments into New Jersey and back into Pennsylvania, and further ordered Blackmore to cease and desist from such operations said:

> "While freedom of commercial intercourse between the states is of such importance that the Congress is

given power to regulate it and the states cannot be permitted to interfere with it, these false movements are not interstate commerce. The mere touching of the soil of another state not made in the ordinary course of business and in the orderly and economical transaction of commerce did not constitute, as we see it, an interference with interstate commerce. In the Nevin Bus Lines Case, cited above, we endeavored to point out the fact that the state may not interfere with the ordinary and bona fide transaction of interstate commerce, and, in so doing, what would ordinarily be intrastate transportation by reason of the interlocking of routes. The difficulty with the appellants' position is that clearly there was no justification for the movement of the freight from Allentown to Hackettstown and then retracing the route within the state of New Jersey to Easton before proceeding to Philadelphia and, to a lesser degree, for the movement of freight from Scranton to Philadelphia. If, as in the Nevin Bus Lines Case, Hackettstown had been a normal junction point for the transfer of freight and the interlocking of routes, the situation would have been different." (183 Atl. 121)

The Maryland Court of Appeals held in the case of *Clark* v. *Public Service Commission of Maryland*, 120 Atl. 2d 363, that motor carrier holding an I. C. C. certificate could not use such certificate as authorization for the hauling of freight by a circuitous route from Baltimore to Annapolis, Maryland, by way of the District of Columbia. The Maryland Court refused to allow Clark to use this subterfuge to evade Maryland law. This language from the Court's opinion is important herein:

"Whether a carrier's transportation of intrastate freight over an indirect interstate route is bona fide interstate commerce or merely a subterfuge to avoid

> the Public Service Commission's jurisdiction is primarily an administrative question to be determined by the Commission. The solution of the problem depends upon the places of origin and destination and whether the routes are necessary and reasonable. * * *." (120 Atl. 2d 368)

In an earlier controversy the Superior Court of Pennsylvania in the case of *Atlantic Freight Lines* v. *Pennsylvania Public Utility Commission*, 60 Atl. 2d 589, Cer. denied 336 U. S. 925, reached a similar conclusion. The Pennsylvania Superior Court held that the carrier's movement of freight into the Maryland Free State was a subterfuge to avoid State regulation. This decision took into consideration the fact that Atlantic had an I. C. C. certificate which Atlantic asserted permitted it to engage in such abnormal operations.

This language from *Eastern Carrier Corporation* v. *United States*, 31 F. Supp. 232, is also pertinent to this inquiry:

> "We think that it is obvious that the intention of Congress in conferring rights under the grandfather clause to carriers who had been engaged in bona fide interstate operations was predicated on the idea that the existence of a bona fide operations across state lines served to raise a presumption that such operations aided convenience and were therefore a public necessity. Thus it may not be concluded that because a carrier transports merchandise across a state line in order to evade the orders of a state public service commission, it has thereby engaged in bona fide interstate commerce serving public convenience and necessity. Upon the contrary, the purpose which the carrier has served by such operation is a purely private purpose, the evasion of the laws of a state." (31 F. Supp. 236)

The reasoning set forth in the opinion of this Court in the case of *Eichholz* v. *Public Service Commission*, 306 U. S. 268, is controlling herein:

> "Appellant insists that the hauling from St. Louis over the state line to Kansas City, Kansas, of merchandise consigned to persons in Kansas City, Missouri, and hauling it back again to its intended destination in Kansas City, Missouri, was actually interstate transportation. Hanley v. Kansas City S. R. Co., 187 U. S. 617, 47 L. ed. 333, 23 S. Ct. 214; Western U. Teleg. Co. v. Speight, 254 U. S. 17, 65 L. ed. 104, 41 S. Ct. 11; Missouri P. R. Co. v. Stroud, 267 U. S. 404, 69 L. ed. 683, 45 S. Ct. 243. That fact, however, does not require the conclusion that the State's action for the protection of its intrastate commerce was invalid. See Lone Star Gas Co. v. Texas, 304 U. S. 224, 238, 82 L. ed. 1304, 1314, 58 S. Ct. 883. We may assume that Congress could regulate interstate transportation of the sort here in question, whatever the motive of those engaging in it. But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected. Cooley v. Port Wardens, 12 How. 299, 319, 13 L. ed. 996, 1004; Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 30 L. ed. 237, 6. S. Ct. 114; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 8 S. Ct. 564, 1 Inters. Com. Rep. 804; Kelly v. Washington, 302 U. S. 1, 9, 10, 82 L. ed. 3, 10, 11, 58 S. Ct. 87. If appellant's hauling of the merchandise in question across the state line was not in good faith but was a mere subterfuge to evade the State's requirement as to intrastate commerce, there is no ground for saying that the prohibition of the use of the interstate permit to cover such transactions, and the application of the Commission's rule prohibiting them in the absence of an intrastate certificate, was an unwarrantable

intrusion into the federal field or the subjection of interstate commerce to any unlawful restraint." (306 U. S. 274)

In applying the above reasoning in the *Eastern Carrier* case, *supra*, the Court said:

> "The language employed by the Supreme Court in the cited case, we think, casts illumination upon the common sense interpretation which must be given to the phrase 'bona fide operation' employed in the grandfather clause of the Motor Carrier Act." (31 F. Supp. 237)

The several decisions and the language which we have quoted from them demonstrate that the mere crossing of a state line does not change the character of the commerce involved. They point to the further fact of the court's inquiry into the mode of operation of a carrier, and more particularly the reasons that such carrier crosses a state line. Courts will not permit a motor carrier to change the character of commerce by commercial arrangements which are not bona fide or permit them to employ discernible subterfuges to avoid regulation by State authorities.

We cannot place too much emphasis on the facts in this case which we have heretofore outlined. To summarize them briefly, it is important to note that the freight involved originated at Virginia points and was destined for delivery at Virginia points. There exists in the Southwestern portion of Virginia a network of improved highways over which these shipments could have been more easily transported without crossing into West Virginia. These shipments, however, were not moved over these highways, but were transported over long, circuitous routes by way of Bluefield, West Virginia. The use of these routes required

the freight to be hauled many additional miles and this, of course, required additional time. Your respondent has, therefore, clearly and concisely demonstrated that these seven shipments were clearly intrastate in character.

The petitioner does not hold a certificate of public convenience and necessity which would permit it to transport these seven shipments by the normal and logical routes. It has, therefore, sought to bring these operations within the authorization contained in its certificate from the Interstate Commerce Commission. (Whether or not such certificate authorizes these operations will be discussed in paragraph (c) of this argument).. A carrier operated by prudent businessmen, not restrained by Federal or State regulation, would not engage in the peculiar and unusual type of operations which the petitioner has heretofore conducted. Service can offer no logical explanation for its abnormal routing of this freight. The record does not indicate that Service has heretofore applied for a certificate of convenience and necessity from the Virginia Corporation Commission which would permit it to transport general commodities between these various Virginia points. Prior to the action of the Virginia Corporation Commission, now being reviewed by this Court, Service was fined for operating in an identical manner.

It is, therefore, apparent that Service has employed this mode of operation as a subterfuge to avoid Virginia's laws and regulations relative to the State's control of its own intrastate commerce. It is, indeed, virtually impossible to penetrate the minds of the officials of this carrier in order to determine their motive for engaging in this type of transportation. We must, therefore, look to all of the facts which are contained in the evidence relative to these operations. The sole result of such examination reveals that Service Storage and Transfer Company, Incorporated, has

employed these routes as a subterfuge in an attempt to avoid State regulation.

(c)

THE PETITIONER'S CERTIFICATE DOES NOT AUTHORIZE THESE OPERATIONS

An examination of petitioner's interstate commerce certificate reveals that it is authorized to transport general commodities as a motor carrier in interstate commerce as follows:

> "Between Bluefield, Va., and points and places within five miles of Bluefield, Va., and those within five miles of Bluefield, West Va., respectively, on the one hand, and, on the other, points and places in that part of Virginia and West Virginia within 75 miles of that territory. Between Bluefield, W. Va., on the one hand, and, on the other, points and places in West Virginia, that part of Virginia west of U. S. Highway 29 and south of U. S. Highway 60 including points and places on the indicated portions of the highways specified, and that part of Virginia north of U. S. Highway 60 which is within 80 miles of Bluefield, W. Va." (Ex. 2, R. 101)

It is the contention of the petitioner that this language authorizes it to transport these seven intrastate shipments involved herein. Your respondent will demonstrate that this contention is not only without foundation, but would adversely affect and destroy the State's orderly flow of intrastate commerce. It is not contended by the Commonwealth that, under certain circumstances, the movement of freight between two points in the same state through a second state does not constitute bona fide interstate commerce. Indeed, we direct this Court's attention to the case

of *Dorhn Transfer* v. *Hoegh*, 116 F. Supp. 177, wherein it was held that the Iowa Commerce Commission could not require the carrier to acquire a certificate in order for the carrier to transport shipments between Iowa points by way of Illinois. Dohrn held an I. C. C. certificate which authorized these interstate operations. The routes employed by Dohrn in conducting these operations were logical and normal in character. Moreover, by moving this freight in this manner it was transported fewer miles and, therefore, arrived at its destination more quickly. It is manifest that this commerce was not only bona fide interstate commerce but that Dorhn did not employ a subterfuge to avoid state regulation.

The petitioner's I. C. C. certificate clearly permits Service to transport *interstate shipments* between certain points in Virginia by way of Bluefield, West Virginia. There is nothing contained in that certificate which would authorize Service to transport intrastate shipments in the manner heretofore described. The certificate is the controlling document in determining the type of operations which Service is authorized to conduct. *United States* v. *Rock Island Motor Transit Company*, 340 U. S. 419, 445, 446. These three paragraphs of Certificate No. M.C.-30471 are pertinent to this discussion:

> "*After due investigation*, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and therefore, is entitled to receive authority from this Commission to engage in transportation in *interstate or foreign commerce* as a motor carrier; and the Commission so finding;
>
> "*It is ordered*, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience

and Necessity as evidence of authority of the holder to engage in transportation in *interstate or foreign commerce* as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be attached to the exercise of the privileges herein granted to the said carrier.

"*It is further ordered*, That the transportation service to be performed by the said carrier in *interstate or foreign commerce* shall be as specified below:" (R. 100) (Italics supplied)

This language clearly authorizes Service to engage only in interstate commerce. It contains no language which could be interpreted to permit it to engage in the mode of operation involved in this controversy. Petitioner contends that this certificate permits it to transport intrastate shipments between Virginia points so long as it moves them through Bluefield, West Virginia. A careful analysis of Certificate No. MC-30471 does not reveal any reasonable basis for this contention. Indeed, the above-quoted language indicates no such stretching of the authority contained in the certificate.

We next turn to the most recent statement of the Interstate Commerce Commission relative to the authority contained in petitioner's certificate. Service Storage and Transfer Company filed a Petition for Declaratory Order, or, in the alternative, for an order interpreting Certificate No. MC-30471, on January 14, 1958. This petition was filed after the State Corporation Commission had heard the evidence and arguments of counsel in the case, but prior to the entry of the final judgment order by the Virginia Commission. Division 1, after reviewing the factual matter which it had before it, stated:

"This Commission has found in numerous proceedings that transportation of shipments in *bona fide* of-

erations between points in the same State moving over authorized regular or irregular routes through another State or through an authorized gateway point in another State to which a carrier is authorized to transport a given shipment from a point in a particular State and from which it is authorized to transport the same shipment to a point in the same State, constitutes transportation in interstate commerce." (Italics added)

The Commission's conclusions are quite obviously correct and founded upon the assumption that the operations of which it was advised are bona fide. It would be illogical to assume that the I. C. C. would attempt to authorize shipments *mala fide*. This statement is borne out by this language from the Commission's opinion:

> *"In the absence of any showing that petitioner's use of its authorized route is a subterfuge to avoid State regulation, or other than a logical and normal operation through the carrier's headquarters we are of the opinion that petitioner's operations, in the manner described, constitute bona fide transportation in interstate commerce.* This conclusion finds support in the fact that the routes employed between Virginia points are not unduly circuitous or impracticable but on the contrary are such as might normally be used by any carrier authorized to operate between the Virginia points involved, and that Bluefield, W. Va., is petitioner's headquarters and the base of other substantial operations to and from points in Virginia of which the operations challenged are only a small part." (Italics added)

It is manifest that the Interstate Commerce Commission recognized the right of the State Corporation Commission to find that the carrier had attempted, by use of subterfuge, to evade State laws and regulations. These conclusions are

buttressed by the Commission's finding that the evidence before it showed that the routes employed by the petitioner "are not unduly circuitous and impracticable." Moreover, the Commission's opinion that the routes of which it was advised were "such as might normally be used" indicates that the Commission was cognizant of the existence of abnormal, unduly long and circuitous routes which the petitioner might use in an attempt to evade State regulation.

The opinion of Division I on its face does not authorize the petitioner to engage in the type of operations herein involved. Moreover, Division I recognized the possibility that Service might attempt to use its I. C. C. certificate in a manner which would be violative of State law. It is, therefore, manifest that Service Storage and Transfer Company, Incorporated, is not authorized by Certificate MC-30471 to transport intrastate shipments by way of Bluefield, West Virginia.

Part II.

IT IS FOR A STATE TRIBUNAL TO DETERMINE WHETHER A CERTIFIED INTERSTATE MOTOR CARRIER IS OPERAING IN VIOLATION OF STATE LAWS.

Your respondent has clearly demonstrated that this commerce, although it moved across a state line, is intrastate in character. The Commonwealth has also shown this movement to be illogical and without reason. This is sufficient to vest the State Corporation Commission of Virginia with the authority to adjudicate this controversy which has now reached this Court. The controlling factor in this case is the evidence involved herein which has heretofore been summarized and analyzed. The control of intrastate commerce is vested in the State, and Section 302(b), Title 49 U. S. C. reaffirms this principle:

> "(b) Nothing in this chapter shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

Congress clearly recognized the necessity for spelling out specifically the power of the states in order that Part II of the Interstate Commerce Act might not be interpreted to divest the states of this vital function. Section 56-278 of the Code of Virginia, 1950, provides as follows:

> "No common carrier by motor vehicle or restricted common carrier by motor vehicle not herein exempted shall engage in intrastate operation on any highway within the State without first having obtained from the Commission a certificate of public convenience and necessity authorizing such operation, and a statement of the State Highway Commission that the law applicable to the proposed route or routes has been complied with as to size, weight, and type of vehicles to be used, and a like statement as to any increase in size, weight, and type of vehicles proposed to be operated by the applicant after such application is granted."

The State Corporation Commission is thereby vested with the authority to control the intrastate operation of common carriers by motor vehicle in Virginia. The intrastate commerce which is involved in this controversy comes within the jurisdiction of this State Commission.

The petitioner recognizes that a state may question the legality of the operations of a federally certified carrier but denies Virginia's jurisdiction in the instant controversy (Petitioner's Opening Brief, p. 28). Service asserts that,

in the instant case, the Virginia Commission was required to seek relief from I. C. C. 49 U. S. C. A. 304(c) permits the Interstate Commerce Commission to entertain such complaints by state boards, but does not require a state commission to petition for relief under the circumstances involved herein. Indeed, petitioner cites no case or federal statute which *requires* a state regulatory agency to seek relief from the Interstate Commerce Commission under this factual situation.

However, Service points to the fact that the Virginia Commission was served with a copy of Service's Petition for Declaratory Order, and did not file any pleading or enter an appearance in that proceeding. This is not denied by the Commonwealth. It is significant, however, to note the sequence of the various proceedings:

(1) June 11, 1956, State Corporation Commission issues rule alleging that Service had transported property in intrastate commerce in violation of Chapter 12, Title 56 of the Code of Virginia (1950). (Case No. 13074 — R. 76)

(2) June 28, 1956, Virginia Commission holds hearing in case No. 13074. (R. 76)

(3) July 9, 1956, Virginia Commission fines Service $25.00 in case No. 13074 for the violations alleged, and delivers opinion. (R. 75-82)

(4) July 12-13, 1956, counsel for Service and Commission exchange letters. (R. 83-85)

(5) No appeal (which is an appeal of right) is taken from Virginia Commission's decision in case No. 13074 to the Supreme Court of Appeals of Virginia.

(6) September 19, 1956, Virginia Commission issues rule alleging that Service has again transported property

in intrastate commerce in violation of Chapter 12, Title 56 of the Code of Virginia (1950). (Case No. 13182 — R. 2-4)

(7) November 29, 1956, Virginia Commission holds hearing in case No. 13182. (R. 4-72)

(8) Transcript of evidence promised counsel for Service by January 15, 1957, and Service to file brief setting forth its position within 20 days thereafter.

(9) January 14, 1957, Service Storage and Transfer Company, Incorporated, files Petition for Declaratory Order before I. C. C. (71 M. C. C. 304)

(10) February 26, 1957, Virginia Commission enters order fining Service $5,000 for ten violations of Chapter 12, Title 56 of the Code of Virginia (1950) in case No. 13182. (R. 72)

(11) March 21, 1957; Virginia Commission delivers opinion in case No. 13182. (R. 74-86)

(12) March 22, 1957, Service notes appeal to the Supreme Court of Appeals of Virginia. (R. 88)

(13) March 29, 1957, Interstate Commerce Commission issues opinion in Service Storage and Transfer Company, Incorporated — Petition for Declaratory Order. (71 M. C. C. 304)

(14) May 14, 1957, Supreme Court of Appeals of Virginia awards an appeal of right to Virginia Commission's decision in case No. 13182.

(15) March 10, 1958, Supreme Court of Appeals issues an order affirming in part and reversing in part the final order of the Virginia Corporation Commission in case No.

13182, together with a written opinion. (R. 88-97) 199 Va. 797, 102 S. E. 2d 339.

(16) October 13, 1958, Supreme Court of the United States grants certiorari to review the judgment of the Supreme Court of Appeals of Virginia.

Service was first proceeded against by the Virginia Corporation Commission in June of 1956, and was fined $25.00 in July of that year for engaging in intrastate commerce without a certificate from the Commission. Service did not choose to appeal this ruling. Thereafter, Service was again ordered to appear before the Virginia Commission for engaging in similar illegal operations. At the hearing in the second case (No. 13182) counsel for Service asked to be permitted to file a brief setting forth his position in the controversy and, upon his assurance that it was not his purpose to delay the proceedings (R. 71, 72), the Commission permitted counsel to file a brief 20 days after a transcript of the proceedings was delivered to him. However, on January 14, 1957, one day before the transcript was to be delivered to counsel, Service filed a Petition for Declaratory Order before the I. C. C. Although the State Corporation Commission was served with a copy of the petition, it declined to appear in the appeal proceeding. On March 21, 1957, the Virginia Commission handed down its opinion in case No. 13182, having entered the final judgment order on February 26, 1957. Thereafter, on March 29, 1957, Division I issued its opinion.

Service did not petition the I. C. C. for relief in this matter until after it had been first fined in case No. 13074, and after it had been heard on similar violations involved in this case, No. 13182. Knowing full well that the Virginia Commission would not rule until petitioner's brief had been filed,

Service filed the Petition for Declaratory Order. Under these conditions Service suggests that the Virginia Commission should have sought relief from the I. C. C. It is manifest that this contention is without any basis.

In discussing this aspect of the case petitioner cites *Nelson v. Jessup*, 134 F. Supp. 221, and *Noble* v. *United States*, 319 U. S. 88, as authority in support of its views. In both cases there was no question raised as to whether or not the commerce was interstate. This is also true with reference to *Castle* v. *Hayes Freight Lines*, 348 U. S. 61, which petitioner cites in his brief on page 29. All of these cases involved a state seeking to prevent a certified interstate commerce carrier from engaging in bona fide interstate commerce. The State admitted in each of the above cases that the commerce in question was interstate, but asserted some other regulatory power over it which the courts in each instance denied.

The Commonwealth has demonstrated that this commerce is intrastate and that the petitioner has asserted his federal certificate as a shield to protect his illegal operations. The State is supreme in the control of its own commerce in that it is not only vitally interested in its own affairs, but the State is more able to assure an orderly flow of commerce within its borders. It is, therefore, manifest that the State Corporation Commission is the proper body to hear and determine a controversy such as this.

It is submitted that even if this Court should find this commerce to be interstate, which the respondent earnestly contends that it is not, the State had such a vital interest in such commerce that the State may regulate it. It is unnecessary to restate the facts in this case. It is sufficient we believe to re-emphasize the local nature of this commerce. These operations are of vital interest to the Commonwealth

and, if this type of illegal action is to be permitted, it could easily destroy the orderly flow of commerce within this State. The Supreme Court of the United States has heretofore, on many occasions, recognized the state's vital interest in local matters and has recognized the necessity for permitting the states to exercise jurisdiction over them. In the case of *Panhandle Eastern Pipeline Company* v. *Michigan Public Service Commission*, 341 U. S. 329, this Court permitted Michigan to control the sale of gas by an Interstate Pipeline Company, even though the gas was clearly in interstate commerce. It must, therefore, be concluded that the Corporation Commission is vested with the authority to adjudicate the questions involved in this controversy, even if this Court should adopt petitioner's argument that this commerce is interstate.

CONCLUSION

The respondent prays that this Honorable Court affirm the judgment of the Supreme Court of Appeals of Virginia for the several reasons herein stated.

Respectfully submitted,

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SUPREME COURT, U. S.

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No. 92

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

SERVICE STORAGE AND TRANSFER CO., INC., *Petitioner*

v.

COMMONWEALTH OF VIRGINIA, *Respondent*

On Writ of Certiorari to the Supreme Court of Appeals of Virginia

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BRIEF ON BEHALF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, AMICUS CURIAE

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February 16, 1959

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BRIEF ON BEHALF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, AMICUS CURIAE

PRELIMINARY STATEMENT

The National Association of Railroad and Utilities Commissioners, hereinafter referred to as the "Association", is a voluntary organization, the membership of which embraces the members of the transportation and public utility regulatory commissions and boards of the several States of the United States except

Alaska. By the constitution of the Association its attorneys may be directed to participate on behalf of the Association (as distinguished from the individual commissions within its membership) in any proceeding pending before any court or commission in which it is felt that participation on behalf of the Association should be made in the general public interest.

On November 20, 1958, the Association, in annual convention assembled, duly adopted the following resolution:

Resolution Relating to the Service Storage and Transfer Company Case

Whereas, There is pending before the United States Supreme Court a proceeding for review of an order of the Virginia Corporation Commission which held certain transportation services of the Service Storage and Transfer Company to be intrastate in nature; and

Whereas, The company claims such transportation between points in the State of Virginia to be interstate in nature by reason of routing such traffic across the state line and back into Virginia;

Now, Therefore, Be It Resolved, That the legal representatives of the National Association of Railroad and Utilities Commissioners are hereby authorized to participate in this proceeding on behalf of the Association in support of the jurisdiction of the state regulatory commission over the transportation involved.

This Association's interest in this proceeding is on behalf of the state commissions and boards represented in the membership of the Association, which agencies are charged by state laws with the duty of regulating the intrastate rates and services of the motor carriers operating in their respective states.

STATEMENT OF THE CASE

There does not appear to be any dispute concerning the facts in the case.

The Service Storage and Transfer Co., Inc. (hereinafter referred to as "Service Company") was hauling property by motor vehicle between points of origin and points of destination both within the Commonwealth of Virginia. It did not have a certificate of public convenience and necessity issued by the State Corporation Commission of the Commonwealth of Virginia (hereinafter referred to as the "Virginia Commission") and required by the Code of Virginia as a prerequisite to engaging in the intrastate transportation of property by motor vehicle in Virginia.

Service Company admitted that it transported the shipments in question, but asserted that all shipments from Virginia origins to Virginia destinations were routed through Bluefield, West Virginia, and were performed under authority granted it in certificates issued by the Interstate Commerce Commission (hereinafter referred to as the "ICC").

By order dated February 26, 1957, the Virginia Commission found Service Company to be operating in violation of the Code of Virginia and a fine was levied.

On review of the Virginia Commission's order, the Supreme Court of Appeals of Virginia upheld the views of the Commission.

STATEMENT OF INTEREST AND POSITION

The Association's interest in this proceeding arises not only because of the challenge to the police powers of the Commonwealth of Virginia but also because the pattern of operation evidenced herein is being repeated in other jurisdictions and the issue involved is in need of being resolved. State regulation of motor transportation is for the protection of the citizens of the respective states and the motor carriers duly certificated in the respective states. If federally certificated carriers can "tack" together several certificates and by the subterfuge of crossing the state line evade the exercise of police power by an individual state, then the effectiveness of state regulation is at an end. If federally certificated carriers can dilute intrastate business between points of origin and points of destination in the same state, then the state commission is at a loss to determine the public convenience and necessity to duly certificate intrastate operators. Nor can satisfactory experience be obtained under such circumstances for a state commission to properly and effectively fix intrastate rates and charges. Motor carriers creating such a situation should not be permitted to accomplish by indirection what they could not do directly.

This Association feels that the hand of state regulation should be upheld under these circumstances and that the order of the Virginia Commission and the action of the Supreme Court of Appeals of Virginia should be affirmed.

Pursuant to Rule 42 of the Revised Rules of the Supreme Court, consent of the parties to the filing of this brief as *amicus curiae* has been obtained.

ARGUMENT

I. The Operations in Question of Service Company Are Not Interstate Commerce Within the Meaning of the Term as Intended by Congress When It Enacted Part II of the Interstate Commerce Act.

Service Company represents that the questions presented in this proceeding are the following:

> "(1) Whether a state agency lawfully may impose criminal sanctions on a motor carrier for conducting interstate operations in accordance with the carrier's interstate certificate of public convenience and necessity as construed by the Interstate Commerce Commission.
>
> "(2) Whether the enforcement of a state statute in a manner which requires discontinuance of motor carrier operations authorized by order of the Interstate Commerce Commission is in conflict with Part II of the Interstate Commerce Act and in contravention of the 'Commerce clause' of Article I, Section 8 of the Federal Constitution.
>
> "(3) Whether a state agency which desires a certificated interstate motor carrier to discontinue allegedly unlawful operations must seek such relief from the Interstate Commerce Commission as provided in Section 204(c) of Part II of the Interstate Commerce Act."

All three of these questions raised by petitioner are completely irrelevant and, as stated, completely presuppose the real question in issue.

No one contends that a state may impose criminal sanctions on a carrier for conducting *interstate* operations certificated by the ICC. No one contends that a state may require a carrier to discontinue *interstate* operations conducted pursuant to a certificate issued by the ICC. No one contends that relief in the form of

discontinuance of *interstate* operations conducted pursuant to a certificate issued by the ICC must be sought elsewhere than from the ICC. None of these questions are presented herein.

The question presented here is whether a state may regulate operations by a motor carrier between points in that state when the transportation would normally and logically be performed within that state.

Petitioner contends here that to challenge state regulatory proceedings on the jurisdictional ground of "interstate commerce" must bring a complete and full halt to state regulation until the ICC passes on the question. Such a contention is a serious blow to our federal form of government and an injustice to the comity which must exist between the several levels of that government. Furthermore, such an overriding of state motor carrier regulation by federal authority was not provided for or intended by Congress when it enacted the Motor Carrier Act.

Section 202(a) of the Interstate Commerce Act provides:

> "The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce . . . and the regulation of such transportation . . . is hereby vested in the Interstate Commerce Commission."

The meaning of this section is clear and unambiguous. The provisions of Part II of the Act apply to motor carriers engaged in bona fide interstate commerce and the regulation of motor carriers engaged in bona fide interstate commerce is vested in the Interstate Commerce Commission.

Section 202(b) of the Act provides:

> "Nothing in this part shall be construed to . . . interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

Thus intrastate commerce within the Commonwealth of Virginia is within the exclusive exercise of the power of regulation by the appropriate agency of the government of Virginia; namely, the State Corporation Commission.

It logically follows that commerce wholly within Virginia, not being "interstate commerce," does not come within the provisions of this part of the Act and is not subject to ICC regulation.

But Congress did not stop here. In further clear and express language the legislators stated in Section 216(e):

> "That nothing in this part shall empower the Commission to prescribe, or in any manner regulate, the rate, fare or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose whatever."

The regulation of intrastate *transportation* was left expressly to the several States.

In *Tucker* v. *Casualty Reciprocal Exchange,* 40 F. Supp. 383, 385, the Court quoted Section 202 (b) as support for the statement that:

> ". . . The Motor Carrier Act of 1935 is not only a case where Congress does not assume to occupy the entire and exclusive field of transportation by motor carriers, but on the contrary, evidences by

> explicit language an express intention to leave the intrastate commerce by motor carriers to the control of the several States. . . ."

This self-evident interpretation of the Act is further supported by a study of the legislative history of the Act. In the House Committee report (H. R. Rept. 1645—74th Congress) to accompany S. 1629—74th Congress, which became the Motor Carrier Act of 1935 (and Part II of the Act), it is stated:

> "S. 1629 fills the gap in motor carrier regulation as between the States. . . ."

The intention of Congress in framing the Motor Carrier Act was to fill "the gap in motor carrier regulation as between States", not to assume the whole field of regulation. Interstate Commerce Commission jurisdiction was to complement and not supplant that of the State regulatory bodies.

Petitioner's claim that interstate commerce has attached to the operations in question is based on its ICC certificates and declarations of the ICC under those certificates.

Service Company's ICC rights enable it to operate "(1) Between Bluefield, Va., and points and places within 5 miles of Bluefield, Va., and those within 5 miles of Bluefield, W. Va., respectively, *on the one hand*, and, *on the other* points and places in that part of Virginia and West Virginia within 75 miles of that territory." Under this certificate either the point of origin or the point of destination of a shipment must be Bluefield, Va., or Bluefield, W. Va., or a point within 5 miles of either.

Petitioner is also certificated by the ICC to conduct operations "Between Bluefield, W. Va., *on the one*

hand, and, *on the other* points and places in West Virginia . . . and . . . part of Virginia." Under this authority either the point of origin or the point of destination of a shipment must be Bluefield, W. Va.

Under either of these grants individually, the carrier could not perform the operations in question in this proceeding. Nowhere in either of the grants is the petitioner authorized to operate between the points in Virginia herein involved. Nowhere is it indicated that the ICC considered as to either grant the public convenience and necessity of conducting operations between the points in Virginia herein involved.

Petitioner justifies its operations under its interstate certificates by "tacking" together its authority from each grant, and thus accomplishes by indirection what it could not do directly.

Further, petition relies on a declaratory order of the ICC interpreting these certificates. It should be pointed out that the declaratory order of the ICC was issued March 29, 1957, over a month after the order of the Virginia Commission, dated February 26, 1957, which is under review herein and hence was not in existence when the matter was before the Virginia Commission.

Second, the ICC's declaratory order was apparently issued without hearing or investigation and solely upon the allegations submitted by petitioner. The order accordingly is qualified by the statement: "In the absense of any showing that petitioner's use of its authorized route is a subterfuge to avoid State regulation, or other than a logical and normal operation through the carrier's headquarters we are of the opinion that the petitioner's operations, in the manner described, constitute bona fide transportation in interstate commerce." In short, the ICC order begs rather than

answers the question of whether the petitioner's operations are "a subterfuge to avoid State regulation" or are "a logical and normal operation."

As an example, from the present case, is the movement from Roanoke, Virginia, to Wytheville, Virginia. Both places are on U. S. Route 11, and the distance by that route is 81 miles. The circuitous route followed by Service Company was 155 miles. The declaratory order of the ICC does not show whether or not this specific route was before the ICC for consideration. The record fails to disclose that the ICC really believes that a carrier who was authorized to use either route might normally prefer to travel 155 miles over the mountains instead of 81 miles down the valley.

II. Assuming, Arguendo, that the Operations in Question Contain Interstate Aspects, They are not such as to Displace the Local Nature of the Transportation and the Interest and Power of the State.

As shown above, Congress in enacting the Motor Carrier Act did not pre-empt the whole field of regulation of transportation by motor vehicle.

This Court has long recognized that where a subject matter has interstate aspects but is clothed in local character, the states are free to exercise regulatory jurisdiction along with the federal government so long as there is no direct and irreconcilable conflict between the two and Congress has not pre-empted the field so as to supersede all state action. *Cooley* v. *Board of Wardens of Port of Phila.*, 12 How. 299(1852); *So. Carolina State Hy. Dept.* v. *Barnwell Bros.*, 303 U. S. 177(1938); *State of Cal.* v. *Zook*, 336 U. S. 725 (1949); *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U. S. 329(1951).

In similar situations arising under the Federal Power Act and involving only *de minimus* interstate elements, this Court has rejected the assertion of federal jurisdiction which would oust State jurisdiction and transfer to federal authority the regulation of local matter, which Congress intended to leave in State control. *Connecticut Light & Power Co.* v. *Federal Power Commission,* 324 U. S. 515, 531. Such is the situation in the present case. *De minimus* interstate elements alone exist. The transportation in question conducted by Service Company is local in nature and not an integral part of any interstate commerce. This Court should reject at the outset, as it did in the *Connecticut Case,* any attempt to extend federal regulation so as to displace State regulation.

In *Central Greyhound Lines, Inc.* v. *Mealey,* 334 U. S. 653, Mr. Justice Frankfurter stated:

> "This case serves to remind once more that courts do not adjudicate abstractions, such as 'What is interstate commerce?' Also, it again illustrates that even if it found that certain transactions in fact constitute interstate commerce, such conclusion does not answer the further inquiry whether a particular assertion of power by a State over such transactions offends the Commerce Clause . . ." (p. 655)
>
> ". . . In a case like this nothing is gained, and clarity is lost by not starting with recognition of the fact that it is interstate commerce which the State is seeking to reach and candidly facing the real question whether what the State is exacting is a constitutionally fair demand by the State for that aspect of the interstate commerce to which the State bears a special relation." (p. 661)

Directly in point with the instant case is the decision of this Court in *Eichholz* v. *Public Service Commission,*

306 U. S. 268(1939). In that case, a motor carrier hauled freight from St. Louis, Missouri, to Kansas City, Missouri routing it through Kansas City, Kansas. In upholding the jurisdiction of the State commission, this Court stated:

> "Appellant insists that the hauling from St. Louis over the state line to Kansas City, Kansas, of merchandise consigned to persons in Kansas City, Missouri, and hauling it back again to its intended destination in Kansas City, Missouri, was actually interstate transportation. *Hanley* v. *Kansas City Southern Ry Co.*, 187 U. S. 617; *Western Union Telegraph Co.* v. *Speight*, 254 U. S. 17; *Missouri Pacific R. Co.* v. *Stroud*, 267 U. S. 404. That fact, however, does not require the conclusion that the State's action for the protection of intrastate commerce was invalid. See *Lone State Gas Co.* v. *Texas*, 304 U. S. 224, 238. We may assume that Congress could regulate interstate transportation of the sort here in question, whatever the motive of those engaging in it. But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected."

See also *P.S.C.* v. *Wycoff Co.*, 344 U. S. 237 (1952).

Returning to the present case what are the "legitimate interests" of the Commonwealth of Virginia in the transportation in question?

(1) The shippers are located in Virginia.

(2) The consignees are located in Virginia.

(3) The arrangements for transportation are made in Virginia.

(4) The transportation originates and terminates in Virginia.

(5) The carrier solicits business in Virginia.

(6) The transportation is performed in large part over the highways of Virginia.

(7) To the extent Service Company performs the transportation involved herein it diverts a volume of traffic otherwise available to haulers duly certificated intrastate by the Virginia Commission.

The above-enumerated "legitimate interests" of the Commonwealth of Virginia are certainly abundant to establish the local nature of the transportation and the fair demand by the State for jurisdiction over the transportation operations in question. This not only for the protection of the intrastate haulers in Virginia but also for the public in Virginia.

The opinion of the Supreme Court of Appeals of Virginia points out that it was "established by uncontradicted evidence that Service did not follow the usual or normal route between the points involved." The Court then listed numerous instances of the circuitous routing pursued by Service Company "for the sole reason that it did not hold a certificate of convenience and necessity from the State Corporation Commission of Virginia." These holdings of the Court, clearly bring the situation within the Eichholz case, *supra*, wherein it was stated:

> "If appellant's hauling of the merchandise in question across the state line was not in good faith but was a mere subterfuge to evade the State's requirement as to intrastate commerce, there is no ground for saying that the prohibition of the use of the interstate permit to cover such transactions, and the application of the Commission's rule prohibiting them in the absense of an intrastate cer-

tificate, was an unwarrentable intrusion into the federal field or the subjection of interstate commerce to any unlawful restraint." (p. 274)

CONCLUSION

In view of the foregoing considerations, we respectfully urge that the judgment of the Supreme Court of Appeals of Virginia be affirmed.

Respectfully submitted,

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February 16, 1959

Certificate of Service

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing first-class mail, postage prepaid, a copy thereof properly addressed to each such party.

Dated at Washington, D. C., this 16th day of February, 1959.

AUSTIN L. ROBERTS, JR.